CHOSES IN ACTION.

A TREATISE

—ON—

THE LAW OF

CHOSES IN ACTION

—TOGETHER WITH—

An Appendix of Forms

AND STATUTES.

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To

THE HONORABLE

ADAM CROOKS, LL.D., Q.C.,

Minister of Education for the Province of Ontario.

THIS MANUAL

—IS—

WITH HIS PERMISSION,

RESPECTFULLY DEDICATED,

—BY THE—

AUTHOR.

PREFACE.

In the initial tentative steps which were taken towards a fusion of Law and Equity, one of the earliest subjects dealt with was that of choses in action; and amid all the efforts which have been made, none has been more successful. The doctrines of Equity and Common Law have been assimilated in the highest degree, where, before, the divergence was very wide, and we now have choses in action as freely assignable at law, as they are in equity.

The result of this assimilation is, that a greater activity is displayed in the assignment of debts, etc., since a debt is generally speaking, as easily recoverable in the hands of an assignee as if it remained in the hands of the original owner. As an evidence of the increase of transactions in assignments of choses in action, it may be mentioned that during the last four years more cases have appeared in our reports under this head, than appeared before that time.

This important subject, however, has remained without a commentator, as no work has anywhere appeared treating of it. To supply the want of such a work, have undertaken this Manual. In so doing, I look with confidence for the generous criticism of the profession. Besides being a subject, on which no other work than this has appeared, it is one of some difficulty. "The law upon this subject is brought to such an exquisite degree of refinement, that it is by no means easy to understand it," is what was said by Lord Justice Brett in *Field* v. *Megaw* (L. R. 4 C. P., 664). I trust that my efforts will tend

towards the elucidation of this important branch of the law, and that my professional brethren, taking all things into consideration, will view with indulgence the attempt which I have made, and look in a spirit not too censorious upon any imperfections that they will discover.

It was my first intention to treat of other matters not embraced in this volume, such as the Limitation of rights of action, and Release, and discharge of same, but these have appeared in various standard text books. I have therefore thought it well to confine my treatment of subjects to those comprised in the within pages. In the chapter on pleading, I have also not given what might be called an exhaustive summary of the cases, having limited the scope of this chapter to the decisions of our Courts on section 9 of R. S. O., cap. 116.

My thanks are heartily tendered to the Hon. Adam Crooks, LL.D., Q.C., for having revised the proof sheets of the work: from time to time it has met with his approval, and I have received from him occasional suggestions as to cases and other comments. I also feel grateful to His Honor, J. S. Sinclair, Q.C., Judge of the County Court of the County of Wentworth, who has likewise assisted me with valuable suggestions, and to D. A. O'Sullivan, LL.B., Barrister-at-Law, who has supplied me with notes of cases not accessible to myself.

J. JAMES KEHOE.

STRATFORD, *March, 1881.*

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REFERRED TO, WITH ABBREVIATIONS.

....	Abbot's Law Dictionary.
Adams' Eq.	Adams' Equity.
.....	Addison on Contracts (7th edition, by Lewis W. Cave).
Add. Torts	Addison on Torts (4th edition).
A. & E., *or* Ad. & E.....	Adolphus and Ellis Reports, K. B.
Anst.	Anstruthers' Reports, Exch.
App. R	Tupper's App. Reports, Ontario.
Atk.....	Atkyn's Reports, Chancery.
Barb	Barber's Reports, New York,
Barron on Bills of Sale..	Barron on Bills of Sale and Chattel Mortgages.
B. & A.	Barnewall and Alderson's Reports, K. B.
B. & Ad.....	Barnewall and Adolphus' Reports, K. B.
B. & C.	Barnewall and Creswell's Reports, K. B.
....	Bate's Digest of Fire Insurance Decisions.
Beav	Beavan's Reports, Rolls Court.
Bing.	Bingham's Reports, C. P.
Bing. N. C.....	Bingham's New Cases, C. P.
Blackstone	Blackstone's Commentaries.
B. & P.	Bosanquet and Puller's Reports, C. P.
Bos. & Pull.	" " " "
Bright	Bright on Husband and Wife.
B. & B	Broderip and Bingham, C. P. Reports.
Brod & Bing.....	" " "

Bro. Ch.	Brown's Chancery Reports.
.....	Burrill on Assignments.
Byles	Byles on Bills (6th edition).
Cal.	California State Reports.
Camp.	Campbell's Nisi Prius Reports.
.....	Canadian Law Times.
.....	Calvert on Parties (2nd edition).
Car. & P.	Carrington and Payne's Nisi Prius Reports.
C. & P.	" " "
.....	Chalmers on Bills of Exchange.
Chamb. R.	Chamber Reports, Upper Canada.
Chit.	Chitty's Reports, Bail Courts.
C. & F.	Clark and Finnelly's Reports, House of Lords.
Cl. & F	" " "
C. B.	Common Bench Reports (Manning, Grainger and Scott).
Com. B.	" " "
C. B. N. S.	Common Bench Reports, New Series.
C. P.	Common Pleas Reports, Ontario.
Coke	Coke's Reports.
Co. Litt.	Coke upon Littleton.
Cox	Cox's Chancery Reports.
Cr. & M.	Crompton & Meeson's Reports.
D. & J.	De Gex and Jones' Chancery Reports.
De G. & J.	" " "
D. M. & G.	De Gex, MacNaghten and Gordon's Ch. Rep's.
De G. McN. & G.	" " " "
De G. & M.	" " " "
Dowl.	Dowling's Practice Cases.
D. & S.	Drewry and Smale's Chancery Reports.
Dr. & Sm.	" " "
D. & W.	Drury and Warren's Irish Chancery Reports.
Eden	Eden's Reports of Northington's Cases, Chan.
Edw. Ch.	Edwards' Chancery Reports, New York.
E. & B.	Ellis and Blackburn's Queen's Bench Reports.
Finch	Finch's Reports.
Freem.	Freeman's King's Bench Reports.
.....	Gilbert on Replevin.
Grant	Grant's Chancery Reports Upper Canada and Ontario.
Gr.	" " " "
Ha.	Hare's Chancery Reports.
Hare	" " "
Hawk. P. C.	Hawkins' Pleas of the Crown.

H. L. Cases..	Clark and Finnelly's Reports of House of Lords' Cases—New Series.
How, (U. S. Sup. Ct....	Howard's United States Supreme Court Reports.
Hunter, N. Y.....	Hunter's New York Supreme Court Reports.
H. & N.....	Hurlstone and Norman's Exchequer Reports.
Iowa	Iowa State Reports.
Ir. Ch. R.	Irish Chancery Reports.
Jac. & Walk.....	Jacob & Walker's Chancery Reports.
J. & H.....	Johnson & Henning's Chancery Reports.
Jur.....	Jurist Reports.
Jur. N. S.	" " New Series.
Keen	Keen's Reports, Roll's Court.
L. J. Ch.....	Law Journal Chancery.
L. R. Adm. and Eccl....	Law Reports. The Admiralty and Ecclesiastical.
L. R. C. P..... ..	" " Common Pleas.
L. R. Eq.	" " Equity.
L. R. Ex.....	" " Exchequer.
L. R. Q. B.....	" " Queen's Bench.
L. R. Ch. D.....	Law Reports, Chancery Division.
L. R. Q. B. D.	Law Reports, Queen's Bench Division.
L. T. N. S.....	" " New Series.
....	Law Times.
Leith's R. P. Stats.	Leith's Real Property Statutes.
Lord Raym.	Lord Raymond's King's Bench Reports.
Mad.	Madox. Exchequer.
M. & G.....	Manning & Grainger's C. P. Reports.
Man. & Gra.....	" " " "
M. & S	Maule and Selwyn's K. B. Reports
M. & W.....	Meeson and Welsby Exchequer Reports.
Mer.....	Merivale's Chancery Reports.
Meriv.....	" " "
Moore, P. C	Moore's Privy Council Cases.
M. & P.	Moore and Payne's C. P. Reports.
M. & C.	Mylne and Craig's Chancery Reports.
M. & K.	Mylne and Keene's Chancery Reports.
New R.	Bosanquet and Puller's New Rep. C. P.
N. Y.....	New York Reports.
Paige.....	Paige's New York Chancery Reports.
Ph.	Phillip's Chancery Reports.
P. Wms.....	Peere Williams' Chancery Reports.
Price	Price's Exchequer Reports.
Raym (Lord).....	Lord Raymond's K. B. Reports.
Roper.....	Roper on Husband and Wife (Jacob's Edition.)
Russ	Russell's Chancery Reports.

Russ. & M.....	Russell and Mylne's Chancery Reports.
Scott.....	Scott's C. P. Reports.
Selwyn, N. P.	Selwyn's Nisi Prius.
Shep. Touch.....	Sheppard's Touchstone.
Sim.....	Simon's Chancery Reports.
Sim. & St.....	Simon's and Stuart's Chancery Reports.
Smith, L. C.....	Smith's Leading Cases.
Sm. Merc. Law.....	Smith's Mercantile Law.
Story.....	Story's Equity Jurisprudence.
Swan.....	Swanston's Chancery Reports.
Swanst	" "
Tapp.....	Tapp on Maintenance and Champerty.
Taunt.....	Taunton's C. P. Reports.
.....	Taylor's Equity.
T. R.	Term Reports (Durnford and East's K. B.)
.....	Termes de la Ley.
.....	Tidd's Practice.
Tupper, App. R.	Tupper's Appeal Reports, Ontario.
T. & R.	Turner and Russell's Chancery Reports.
U. C. C. P.....	Upper Canada Common Pleas Reports.
U. C. L. J.....	" Law Journal.
U. C. R.....	" Queen's Bench Reports.
Vern.....	Vernon's Chancery Reports.
Ves. Jr.	Vesey, Junior, Chancery Reports.
Ves. Sr.	Vesey, Senior, Chancery Reports.
Walkem, M. W. P. Acts..	Walkem's Married Women's Property Acts.
....	Waterman on Set-off.
W. R.....	Weekly Reporter.
.....	Williams on Executors.
Williams' Saunders.....	Williams' Notes to Saunders' Reports.
Wils.	Wilson's K. B. Reports.
Y. & C.	Younge and Collier's Exchequer Cases.
Y. & C. Ex. Ca.....	" " "
Y. & C. C. Ca.	Younge and Collier's Chancery Cases
Y. & J.....	Younge and Jervis Exchequer Reports.
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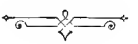

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THE

LAW OF CHOSES IN ACTION.

CHAPTER I.

INTRODUCTORY.

Definition.

Assignment of Choses in Action not recognized formerly.

Change of the Law in regard to Assignments.

Illustrations of Common Law Doctrine.

Change effected by the Statute, 35 Vic., cap. 12.

Equitable Doctrines relating to Assignments.

The Administration of Justice Act.

Other Statutes.

Exceptions to Rule under former Law.

Definition.

According to Blackstone, property in chattels personal may be either in possession or in action. In the first case, the owner has not only the right to enjoy, but also the actual enjoyment of the thing; in the latter, he has merely a bare right, without any occupation or enjoyment.

This property in action is called by the learned commentator, a "Chose in Action," which term he proceeds to de-

fine in these words: "Property in action is such where the man hath not the occupation, but merely a bare right to occupy the thing in question, the possession whereof may, however, be recovered by a suit or action at law; from whence the thing so recoverable is called a thing or *chose in action*. Thus money due on a bond is a chose in action; for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by course of law. If a man promises, or covenants with me, to do any act and fails in it whereby I suffer damage, the recompense for this damage is a chose in action; for, though a right to some recompense vests in me at the time of damage done, yet what and how large such recompense shall be, can only be ascertained by verdict, and the possession can only be given over by legal judgment and execution. In the former of these cases the student will observe, that the property or right of action depends upon an *express* contract or obligation to pay a stated sum: and, in the latter, upon an *implied* contract, that if the covenantor does not perform the act he engaged to do, he shall pay me the damages I sustain by this breach of covenant. And hence it may be collected, that all property in action depends entirely upon contracts, either express or implied; which are the only regular means of acquiring a *chose in action*." (Blackstone Comm., Vol. II, p. 396.)

However, this limitation of the term chose in action to such rights of action only as arise out of contract, differs from the meaning given in other books; for, in the "Termes de la Ley," published in 1708, prior to the time of Blackstone, a chose in action is thus defined: "A Chose in Action is when a man hath cause, or may bring an action for some duty due to him, as upon an obligation for a breach of covenant, for trespass, or the like; and indeed wherever a thing is not in possession, but where, for re-

covery of it, a man is driven to his action (and consequently enjoys a right merely) such thing is called a Chose in Action."

In a modern work, "Abbott's Law Dictionary," the definition of the term is as follows: "A Chose in Action is any right to debt or damages, whether arising from the commission of a tort, the omission of a duty, or the breach of a contract. A Chose in Action includes all rights to personal property not in possession, which may be enforced by action, demands arising out of torts as well as contracts. Chose in Action is a phrase which is sometimes used to signify a right of bringing an action, and at others, the thing itself which forms the subject matter of the right, or with regard to which that right is exercised; but it more properly includes the idea, both of the thing itself, and of the right of action annexed to it. Thus, where it is said that a debt is a chose in action, the phrase conveys the idea not only of the thing itself, *i.e.*, the debt, but also of the right of action, or of recovery, possessed by the person to whom the debt is due."

It will thus be seen that while Blackstone expressly limited choses in action to those rights arising out of contract only, other writers have included within the meaning of the term, rights arising from torts, and this seems to be the more general acceptation of the term. In another part of his commentaries, Blackstone points out how rights arising out of torts are to be distinguished from what he terms Choses in Action, in this way: Rights of action growing out of torts are inchoate rights, which do not become vested until the party entitled has obtained the judgment of a Court of Law in his favor. In this treatise the comprehensive and more generally understood sense of the term will govern, in treating of Choses in Action, instead of the limited application of it given by Blackstone.

Assignments of Choses in Action not recognized formerly.

It was formerly the policy of the common law not to recognize the assignment of choses in action. It was considered, to use the words of Lord Coke, that it would be, "The occasion of multiplying of contentions and of suits, of great oppression of the people, and the subversion of the due and equal execution of justice;" and the same distinguished juror further says, that "the great wisdom and policy of the sages and founders of our law have provided that no possibility, right, title, nor thing, shall be granted to strangers." (*Lampet's* case, 10 Coke, 48. See also *Schmaling* v. *Tomlinson*, 6 Taunt. 147.) So far did this doctrine extend that even a man's personal representatives could not enforce any right unless it was founded on some duty, covenant, debt, obligation or contract creating a demand capable of being directly liquidated or ascertained, so that rights arising out of tort to be satisfied only by recovery of damages, were not by the common law, transmissible, even to the successor whom the law allowed to represent and, as it were, continue the person of a deceased individual (Tapp on Maintenance, p. 8); it is only by the equitable interpretation given to a remedial Statute (4 Edw. 3, c. 7,) that a man's personal representatives, can, even at this day, enforce many rights of action which may have formed a very valuable part of the proprietary interests of the deceased, (1 William's Saunders, 216 a., note to *Wheatley* v. *Lane*). The Common Law maxim *actio personalis moritur cum persona* is still in full force, except in regard to certain rights which are founded on loss or damage to the *property* of the deceased. (See William's Executor's, pt. 2, bk. 3, c. 1, s. 1); there is also another exception (as regards the *person* of the deceased), instituted by Rev. St., Ont., cap. 128, which secures compensation to the wife and family of a person killed by any wrongful act, neglect or default of

any one, or killed in a duel. But this Act applies only when the death has been caused by the injury, and leaves other torts such as libel, slander, false imprisonment, etc., unprovided for.

Change of the Law in regard to assignments.

The rigor of the law, as far as regards the assignment to third parties of rights arising out of contract, was also relaxed subsequent to the time of Lord Coke, for, in *Balfour* v. *The Sea Fire Insurance Company*, 3 C. B., N. S., 305, Willes, J., says, referring to a case cited from Brooke's Abridgment, "The Court there seems to have considered that there could not be an assignment of a debt. That doctrine has, as every one must know, been long since exploded. Certainly, so long since as the year 1791, and probably two hundred years before, as appears from *Master* v. *Miller*, 4 T. R. 340, where Buller, J., says 'It is laid down in our old books that, for avoiding maintenance, a chose in action can not be assigned or granted over to another. The good sense of that rule seems to me to be very questionable, and in early, as well as in more modern times, it has been so explained away, that it remains only an objection to the form of the action in any case.'"

In a case in our own Reports (*Blair* v. *Ellis*, 34, U.C., R. 466.) Richards, C.J., referring to this latter *dictum*, says, at page 471: "I think this confirms the view I have always entertained, that debts were assignable, but not assignable so as to permit the assignees to sue for them in their own name." (See also *Ham* v. *Ham*. 6 C.P., p. 37 ; *Sterling* v. *McEwan*, 18 U.C., R., 465; *Eakins* v. *Gawley*, 33 U.C., R., 178; *Legh* v. *Legh*, 1 B. &. P., 447 ; *Alner* v. *George*, 1 Camp., 392 ; *Fairlie* v. *Denton*, 8 B. & C., 395 ; *Phillips* v. *Clagget*, 11 M. & W., 395, and *Martin* v. *Williams*, 1 H. & N., 817.)

Thus it became a settled doctrine at common law that, although choses in action were not assignable so as to en-

able the assignee to sue for them in his own name, they became assignable to this extent: he was, in general, permitted to bring his action and to recover in the name of the original assignor, the party with whom the contract was entered into. (*Addison on Contracts*, 7th ed., p. 312.)

In modern times too, the English Legislature, yielding to the wants and necessities of mankind, had sanctioned the assignment of certain bonds and contracts, such as bail bonds, (4 Anne, c. 16, sec. 20), and replevin bonds, (*Thomson* v. *Farden*, 1 Man. & Gra. 535, *Dias* v. *Freeman*, 6 T. R., 195. Addison on Contracts, 7th ed., p. 312) and our Ontario Statutes, as will be subsequently seen, have made still further advance in abolishing the ancient rule of law against the assignment of choses in action, so that the rule is now reduced to a mere shadow.

Illustrations of Common Law Doctrine.

To illustrate the modern common law principles relating to the assignment of choses in action, independent of late legislative enactments, the following three cases fairly exemplify this branch of the law. Firstly. In a case, according to the procedure above mentioned, the name of the assignor was used by the assignee in suing for the assigned debt; the defendant pleaded that the plaintiff (the assignor) had, previous to action brought, made a deed of composition in bankruptcy, and that, therefore, this claim sued for vested in the trustee in bankruptcy; it was held that the assignment of the causes of action, carrying with it, all rights of action and that there having been an absolute assignment of a beneficial interest in the debt the assignor might sue, as trustee for the assignee of the debt, notwithstanding his subsequent execution of a composition deed (The "Wasp," L.R., 1 Adm. & Eccl. 367).

In another case, A. & B., by deed, assigned to C. certain debts mentioned in a schedule attached to the assignment, with power to C. to sue in the names of A. & B. C. having brought an action in the names of A. & B. against a debtor whose debt was stated in the schedule to be £250, and having obtained a *capias* to hold him to bail, A. caused the sheriff to discharge the debtor. C. then brought an action against A. upon the implied covenant in the deed that he would do no act in derogation of his grant. A. pleaded that the debtor was, without his knowledge or consent, wrongfully and unlawfully held to bail for a much larger amount than the sum of £250 mentioned in the schedule as due from him, therefore A. ordered him to be discharged. It was held, that this was no answer to the action on the implied covenant of A. to do no act in derogation of his deed of assignment (*Gerard* v. *Lewis*, L.R., 2 C.P., 305.)

The third case arose out of an equitable plea. As will be seen in the third chapter, Choses in Action have always been assignable in equity, and the assignee had the right to sue in his own name. It may also be mentioned that previous to the Administration of Justice Act of 1873 in this province, (see sec. 3 of 36 Vic. cap. 8) pleas upon equitable grounds, were under certain restrictions; according to the rules of pleading established under the Common Law Procedure Act, (Con. Stat. U.C., cap. 22) which, in this respect followed the English Statute, it was held that such pleas would not be allowed unless the plea set up facts which entitled the defendant to an absolute perpetual and unconditional injunction in a Court of Equity. (See Harrison's C.L.P. Act, p. 169 and cases cited.) Accordingly under this rule, in an English case (*Jeffs* v. *Day*, L.R., 1 Q.B., 372), a plea on equitable grounds to an action for money due on an award alleging that the plaintiff assigned the debt to D. & Co., who gave notice to the defendant, and

that the assignment still remained in force, and that the defendant still remained liable to pay D. & Co., that the action was not brought for the benefit of D. & Co., nor with their consent, and if the plaintiffs recovered in the action, the defendant would, nevertheless be held to pay D. & Co., was held to be a good plea, as a Court of Equity would grant an absolute perpetual and unconditional injunction to restrain the plaintiff from suing for his own benefit.

Change effected by the Statute, 35 Vic., cap. 12.

These cases show the spirit in which the assignment of choses in action was dealt with by the courts of common law prior to 35 Vic. cap. 12. (Rev. Stat. Ont., cap. 116, secs. 6 to 12 inclusive). By this Statute it was enacted that "every debt and chose in action arising out of contract shall be assignable at law by any form of writing, but subject to such conditions or restrictions with respect to the right of transfer as are contained in the original contract; and the assignee thereof shall sue thereon in his own name in such action and for such relief as the original holder or assignor of such chose in action would be entitled to sue for in any court of law in this province" (Rev. Stat. Ont., cap. 116, sec. 6).

This, and the other sections of the Revised Statute which deal with bills of lading, corporation debentures, rights of sureties paying principal debt, to assignment of securities, rights of set off, etc., are treated of in the following chapters of this work.

Equitable Doctrines relating to Assignments.

While the common law doctrines relating to choses in action and their assignment were such as above described, Courts of Equity recognized such assignments, and gave the assignee the right to sue in his own name. The prin-

ciples on which Courts of Equity acted strongly favored these assignments as will be seen in the third chapter. There is practically, at present, very little difference between equitable assignments, and assignments under the Statute. However, one difference may here be noted: under the Statute the assignment must be in writing (see sec. 6, *supra*), while in equity a verbal assignment is sufficient, (see post Chap. III.)

The Administration of Justice Act.

It is also to be observed that the Administration of Justice Act, (Rev. Stat. Ont., cap. 49,) further facilitates the suing at law for an assigned chose in action; section 4 of this Statute enacts that "any person having a purely money demand may proceed for the recovery thereof by an action at law, although the plaintiff's right to recover may be an equitable one only, and no plea, demurrer, or other objection, on the ground that the plaintiff's proper remedy is in the Court of Chancery, shall be allowed in such action." (Sec. 4.) Under this section, independent of Rev. Stat. Ont., cap. 116, an assigned debt or other chose in action can be sued for at law in the assignee's name. (*Blair* v. *Ellis*, 34 U. C. R., 466; *Cole* v. *Bank of Montreal*, 39 U. C. R. 54.)

As will be seen in Chapter III., a *verbally* assigned debt or other chose in action can be sued for in equity. The question here arises, whether a debt or other chose in action answering the description of "a purely money demand", which has been verbally assigned, can be sued for at law under this section of the Administration of Justice Act. The Act relating to choses in action (Rev. Stat., cap., 116,) requires the assignment to be in writing. As to whether a verbally assigned "purely money demand," which is not covered by this latter mentioned Statute, can come within section 4, of the Administration of Justice Act,

and be sued for at law, is a point still undecided, and the author simply presents the question for consideration. As to what is a "purely money demand," see *dictum* of Harrison, C.J., in *Cole* v. *Bank of Montreal*, 39 U. C. R., at p. 71, in which he holds that there is no distinction between a "money demand" and a "purely money demand." (See also *Parkinson* v. *Clendinning*, 29 U. C. C. P. 13; *Hope et al* v. *Ferris*, 30 U. C. C. P. 520.)

Other Statutes.

The different Insolvent Acts which have been in force in Canada necessarily made provision for the assignment of choses in action, vesting the debts, etc., due the insolvent in his assignee, by virtue of the assignment or writ of attachment, as the case might be; they also made provision for the transfer of debts, etc., from the assignee to third parties. These provisions were before the Ontario Statute, 35 Vic., cap. 12. This latter Statute was in advance of legislation on the same subject in England, in which country the Judicature Act, 1873, (36 & 37 Vic., cap. 66, sec. 25, sub-sec. 6,) provides, that "any absolute assignment by writing, under the hand of the assignor, (not purporting to be by way of charge only,) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not been passed) to pass and transfer the legal right to such debt or chose in action, from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor." The wording of the English Act is different

from that of section 6 of our Rev. Stat., cap. 116; it will be observed that "express notice in writing" to the debtor, is made a condition precedent under the English Act, to the chose in action being vested in the assignee. The necessity of notice under our Statute will be discussed in a subsequent chapter.

Exceptions to rule under former law.

The ancient rule of law against the assignment of choses in action had no existence in certain cases. Thus, as is said in Shepherd's Touchstone (p. 97), the King might, by his prerogative, assign a chose in action to A., and it will be a good assignment, and in Blackstone's Commentaries (Vol. II., p. 442,) it is laid down that the King might always either grant or receive a chose in action by assignment, (see also *Lambert* v. *Taylor*, 4 B. & C. 138); but in case the person to whom a chose in action had thus been assigned by the King assigned to another, this latter assignment was void. There was also another exception as regards choses in action of a wife, which, by virtue of the marriage, became, under the old law, assigned to the husband. But this latter was a qualified assignment, for it was necessary that the husband should reduce them into possession during his life, otherwise, at his death, his wife, and not his personal representative, would have been entitled to the choses in action. This transfer of the wife's choses in action to the husband was incidental to the general rule of law, (previous to our Married Women's Property Acts,) that marriage vested all the wife's personal property in the husband. Marriage also made him liable for her debts. Another exception to the ancient rule was that choses in action were (to the extent already explained) assignable by death, and still another was that included under the complicated law relating to covenants running with the land. The most important exception, however,

was the negociability of promissory notes and bills of exchange.

Many branches of our laws have lately been in a state of transition, great changes having been made, both by legislative enactment and by the development and expansion of principles, under judicial sanction, to suit the exigencies of the times. Both in substantive principles and in procedure have these changes been effected; but in no branch has there been more variation than in the law relating to choses in action. Nothing exemplifies more strongly the changes which have taken place in our laws than the progress from the rigid rule laid down by Lord Coke against the assignment of choses in action to the present state of the law, making them freely transferable, both at law and in equity. Considering the decisions of Courts, and the enactments of our Legislature, the saying of a distinguished legal writer, that the ancient rule of law has "evaporated to a mere shadow," is forcibly illustrated. (See Addison on Contracts, 7th edition, by Lewis W. Cave, p. 311.)

CHAPTER II.

GENERAL PRINCIPLES RELATING TO RIGHTS OF ACTION.

No wrong without a Remedy.
Rights of Action.
What is a Wrong?
Damage without Wrong.
Wrong without Damage—When Actionable.
When not Actionable.
Wrong and Damage together, sometimes not a Cause of Action.
Practical Suggestions.

No wrong without a remedy.

It is an elementary principle of our law that there is no wrong without a remedy, or, as is affirmatively expressed in the Latin maxim "*Ubi jus ibi remedium,*" If a man has a right he must have a means to vindicate and maintain it, and a remedy if he is injured in the exercise and enjoyment of it; "and indeed it is a vain thing," as expressed by Lord Holt, in the celebrated case of *Ashby* v. *White,* (2 Lord Raym. 953), "to imagine a right without a remedy, for want of right and want of remedy are reciprocal."

Rights of Action.

Since, then, the law affords a remedy for every wrong, the mode pointed out by the law for enforcing the remedy is called "action." Hence we have a "right of action," which is defined in the Roman law to be *jus persequendi quod sibi debetur.* The modes adopted, both at law and in equity, for the purpose of enforcing rights of action are very many, and vary according to the remedy or relief to be sought for. Thus we have the ordinary writ of sum-

mons at law, and also writs of mandamus, replevin, ejectment, etc., while in equity there are other various modes of righting wrongs or applying relief to cases where a right is infringed or a wrong inflicted. It is not within the province of this manual to inquire into the nature of these different methods or to follow out the course of an action or suit as it is administered either at law or in equity. These would form vast subjects in themselves, and will be found in the different works relating to Common Law and Chancery. In this work the substantive principles governing rights of action will be found treated of.

What is a Wrong.

The maxim *ubi jus ibi remedium* must be understood with certain qualifications; these depend upon what is considered by the law to be a "wrong," and this is, in practice, a very important question, since in the determination of it depends the other question as to whether a right of action exists in any given case. As said by a very able commentator "It is not every substantial wrong, still less every imaginary grievance which affords a right of action for redress. Nor is it true that for every kind of loss a damage occasioned by the act of another, a remedy is given by the law. It not infrequently happens that damage palpable and undeniable though it be, is in technical phraseology *damnum sine injuria*, that is, damage unaccompanied by any tortious or wrongful act whereof cognizance can be taken in a court of justice" (Broom's Com. Law, Bk. I., chap. III.).

Damage without Wrong.

The word "*injuria*" signifies a "legal wrong," that is, a wrong cognizable or recognized as such by the law, and the word "*damnum*" means "damage," not necessarily

pecuniary damage but any damage capable of being estimated by a jury. With these meanings of these words, is comprehended the principle that *damnum sine injuria* is not actionable.

There are several well-known and leading cases in our law books which illustrate this theory. Thus, where a school-master is injured by the establishment of a school adjacent to his own, or a mill-owner loses custom by the erection of another mill in the neighbourhood of the mill worked by him, there is no *injuria* or actionable legal wrong in any of these cases. So, a literary criticism which does not exceed the limits of fairness and does not attack the character of the writer unconnected with his publication, although it exposes the follies and errors of the work is not a libel for which an action can be brought. In such a case, although there be *damnum* there is no *injuria;* and even the loss is that which the party ought to sustain, inasmuch as it is the loss of fame and profits to which he was not fairly entitled. So an act of force done in necessary self-defence causing hurt to an innocent by-stander is not actionable, for no man does wrong in defending himself against an aggressor. And if a man sells a house commanding a fine sea view, or a lovely prospect, and then builds on his own adjoining land, so as to shut out the sea view, or the prospect, and thereby greatly diminishes the market value of the house he has just sold, a great damage is done to the purchaser thereof; but there is no tort or wrong, as the vendor has done nothing which restrains him from interfering with his neighbour's prospect. If a land-owner whose land is exposed to inundation from the overflowing of an adjoining creek or river, erects a dam for the protection of his land, and by so doing, causes the current to flow against the land of his neighbor and wash it away, or cover it with water, the land-owner so causing an injury to his neigh-

bor, is not responsible in damages to the latter, as he has done no wrong, having acted in self-defence, and having a right to protect his land and his crops from the inundation. (See these and other cases cited in Add. Torts. chap. III.)

Indeed, the principle, *ex damno sine injuria non oritur actio* being a fundamental maxim of our law, going to the root of nearly every case, nearly every decision in a volume of Reports which is decided upon the substantive principles involved in a cause of action, will illustrate this far reaching proposition. Either one way or the other, as it is decided in each case, that there is or is not a right of action, will be found the effect of this and the other elementary propositions mentioned in this chapter.

Wrong without Damage.

Another proposition is, that *injuria sine damno* is, as a general rule, actionable at law. By this is meant that a legal wrong, though not productive of actual damage, is a sufficient right of action; and thus it is actionable to deprive a man of a right given him by law, although no damage loss or injury has been sustained. This is very clearly illustrated in the celebrated case of *Ashby* v. *White* (2 Lord Raym., 953; 1 Smith's L.C., 185). This was an action against a returning officer for refusing to receive plaintiff's vote at a parliamentary election; and, although the candidates in whose favor the vote had been tendered were elected, it was *held*, that the action lay, on the ground that the plaintiff, having a legal right and privilege to give his vote, and having been disturbed in the enjoyment of such right, an action was maintainable at his suit against the party causing the disturbance. In his well-known and eloquent judgment in this case, Lord Holt, after enlarging upon the value of the plaintiff's right, said: "I am of opinion this action on the case is a proper ac-

tion. My Brother Powell thinks that an action upon the case is not maintainable because here is no hurt or damage; but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right." And further on, he says: "The plaintiff has a particular right vested in him to vote. Is it not then a wrong and an injury to that right to refuse to receive his vote? * * * If such an action comes to be tried before me, I will direct the jury to make him pay well for it; it is denying him his English right; and if this action be not allowed a man may forever be deprived of it." Referring to the language above used by Lord Holt, to the effect that every *injury* imported a damage, the learned author of "Broom's Common Law," remarks: "It is quite clear that in thus speaking, Lord Holt uses the term *injury* as synonymous with *injuria* in its *strict* sense, *i.e.*, as signifying a wrong recognized as such by the law; and when so understood, the proposition which he lays down, viewed by the light of subsequent decisions, does not seem to be at all too broadly stated."

Other instances of the proposition that *injuria sine damno* is actionable, are the infringement of a patent or a copyright, a bare trespass to land, the invasion of a trade mark and different other cases where damages, nominal at all events, are recoverable, (see *Crawshay* v. *Thompson*, 4 C.B., 357; *Novello* v. *Sudlow*, 12 C.B., 177).

Where injuria sine damno is not actionable.

There are also many cases where a right is violated or a wrong done, and where there is no right of action unless damage is proven to have followed: for instance, in the case of a breach of a public duty in which a party is in-

terested, he must shew some special damage to himself before he can bring a right of action. The breach of a public duty involves two torts: the wrong done to the public, and the wrong done to the individual; where individuals suffer wrong or sustain damage in common with other members of the community, as in the case of a public nuisance, they have no personal rights of action; the private grievance is merged into that of the public, which is vindicated by public prosecution. Even where one person suffers more than others, he has no separate individual right of action; it is only where he suffers some special damage, differing in kind from that which is common to others, that a personal remedy accrues to him (*Greasy* v. *Codling*, 2 Bing., 263; *Wilkes* v. *Hungerford Market Co.*, 2 Bing., N.C., 181; *Henley* v. *Mayor of Lime Regis*, 5 Bing., 91, 2 C. & F., 331.)

Again, mere negligence, without damage resulting therefrom, gives no right of action; neither does slander, (not actionable in itself, without special damage,) afford a ground of action. But in these cases, as observed in Broom's Common Law, Bk. I., Chap. III.: "It would seem more correct to say that in none of the cases just alluded to [*i. e.*, mere negligence and slander] does the alleged wrong, unless when accompanied by special damage, fill out the true measure and conception of a legal injury."

Wrong and damage together sometimes not a sufficient cause of action.

There are certain rules of law which sometimes operate to prevent both a wrong and the damage resulting from such wrong, forming a cause of action. Thus where the damage is too remote, the law will afford no redress. The general rule as to remoteness of damage is laid down to be that,—where two parties have made a contract which one

of them has broken, the damages which the other party ought to receive in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. (*Hadley* v. *Baxendale*, 9 Exch. R. 341.)

Analogous rules as to remoteness of damage in cases arising out of tort are also in force. For illustrations of the rules as to remoteness of damage, both in actions *ex contractu* and *ex delicto*, the reader is referred to Mayne on Damages (Chap. II).

Another rule of law, the effect of which is to prevent both wrong and damage from affording a right of action, is where the wrongful act amounts to a *felony*, the remedy for the private or civil wrong is postponed until the injury done to the public is first satisfied by being disposed of before the proper criminal tribunal. "The policy of the law," observes Lord Ellenborough, "requires, that before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect of the public offence; and after a verdict, either of acquittal or conviction, the judgment is so far conclusive in any collateral proceeding *quoad* the particular matter, that the objection is thereby removed of bringing that *sub judice* in a civil action, which was a proper subject matter of a criminal prosecution. Where, therefore, the defendant has been tried and acquitted of a felony, the objection founded on the general policy of the law does not apply. The only difference which can be suggested between the case of a

prior conviction and that of an acquittal is, that the acquittal may have been brought about by the defendant's colluding with the prosecutor; but if the acquittal be shewn, either in pleading or by evidence, to have been obtained by collusion, it would be put aside and the objection would still remain." (*Crosby* v. *Leng*, 12 East, 413; 1 Hale, P. C. 546).

An important class of cases, offering a further exception to the rule that both *damnum* and *injuria* combined, form a cause of action, is that which establishes the non-liability of judicial officers for errors of judgment made by them. It is a rule of great antiquity that no action will lie against a judge of record for anything done by him in the exercise of his judicial functions. "In the imperfection of human nature," says Lord Tenterden, "it is better that an individual should occasionally suffer a wrong, than that the course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it. Corruption is quite another matter; so also are neglect of duty and misconduct; for these I trust there is, and always will be, some due course of punishment by public prosecution." (*Garnett* v. *Ferrand*, 6 B. & C. 611.)

These are the general principles governing rights of action, illustrating the meaning of the maxim, *Ubi jus, ibi remedium*, and the qualifications with which it is to be understood. This maxim has a wide operation, as has been seen, and pervades the whole system of our law. It was owing to the principle enunciated by it, that the important form of action known as "action on the case" was invented, and it was in spirit with the same principle that the statute was created, entitling an assignee of a chose in action to maintain, for the right assigned to him, an action at law in his own name.

Practical suggestions.

It will not be out of place to append to this chapter some valuable practical suggestions contained in a work which, perhaps, is not widely enough read, and in which there is a great deal of valuable learning. The following useful considerations from Warren's Law Studies will be profitably weighed in connection with the general principles which form the subject of the previous pages.

"Before advising the commencement of legal proceedings, four points require careful consideration. The nature of the right affected; the mode of committing the injury; the occasion, or purpose of committing the injury; and with what intention.

"*First*, as to the right affected. Was it a public right, or a mere private right? Does it regard his interest in a wife, child, apprentice, or servant? Is it a right of his own or belonging to him only in his representative capacity as executor, trustee, or assignee? To himself alone, or jointly with others? If relating to real or personal property—is that property corporeal, and in the possession of the plaintiff? Or incorporeal? Has he only a right, vested or contingent, to future possession? Is his interest in reversion or remainder?

"*Secondly*, as to the mode of committing the injury. It may be one of three kinds: *i.e.*, by non-feazance, which means the simply not doing what, by legal obligation, or duty or contract, the defendant ought to have done. Or, secondly, by mis-feazance, by which is signified the performance in an improper manner, of some act which it was the defendant's duty, by contract or otherwise, to have done, or of some act which he had a right to do. Or, thirdly, by mal-feazance, *i.e.*, the unjustifiable performance of some act

which the defendant had never any right to do, or had, by contract or otherwise, divested himself of the right. These several modes of committing private injuries are compensated by peculiar and appropriate remedies; and the form adopted must correctly describe them.

"Did the injury, ceasing to be merely *private*, become a public one—and amount to a crime, *i.e.*, to felony or misdemeanour? If private, was it only a tort (*i.e.*, a wrong unconnected with contract)—or merely a breach of contract? If the former, was the injury direct or immediate, or only consequential? Was it with force? or without force? by non-feazance, mis-feazance, or mal-feazance? If the latter, viz.: a breach of contract—what kind of contract was it? one implied or express? And in the latter case, was it merely verbal, in writing, or by deed?

"*Thirdly*, on what occasion, or for what purpose, was the injury committed; was it *prima facie* lawful? or *prima facie* unlawful?

"*Fourthly*, with what intention? For, though the intent with which an act was done, is all important in criminal cases, and, generally speaking, immaterial in civil cases when the act once occasioning an injury is, in strictness, illegal; yet there are cases where the intention is, in civil cases, of vital importance—as in the case of slander, libel, malicious prosecution. In some other cases, also, the intention with which an act has been done may be traversed. See *Griffith* v. *Harrison*, 1 Salkeld, 199-7, (per Holt, C. J.); *Lucas* v. *Nockells*, 10 Bing, 172, *et seq.*

"To a certain extent involving the consideration of these topics, there are certain preliminary questions which always occur to a cautious, thoughtful and experienced practitioner.

"Does any act yet remain to be done on the part of the plaintiff to enable him to sustain an action?

"Has any statutory requisition been overlooked? any previous tender? notice? demand? offer? request? or, in short, any other step omitted which is dictated by necessity, or, at all events, prudence?

"And further, has any essential preliminary not only been attended to in point of fact, but is the plaintiff provided with proper evidence of that fact?"

Added to these considerations is another—that of the probable damages to be recovered. Is it worth the plaintiff's trouble to proceed with his action, when, if in case of his succeeding, he will be likely to recover only nominal damages, or damages of a small amount?

CHAPTER III.

EQUITABLE ASSIGNMENTS.

Courts of Equity favor assignments of Choses in Action.
Principles of Equity recognized at Law.
Contracts against Public Policy.
What constitutes an Assignment.
Conditional Assignment.
Voluntary Assignment.
Assignee entitled to collateral securities.
Assignment subject to Equities.
Notice of Assignment.
Future and contingent rights assignable.
Assignment of Debt charged on land not subject to Registration Laws.
Sequestration.
Specific Performance.
Where Law affords Remedy, Equity will not interfere.

Courts of Equity favour Assignments of Choses in Action.

While formerly the Courts of Common Law adopted rules which were adverse to the assignment of choses in action, Courts of Equity on the other hand tctally disregarded such rules, and gave effect to such assignments: (Story's Eq., sec. 1040; *Burn* v. *Carvalho*, 4 M. & K. 690; *Prosser* v. *Edmonds*, 1 Y. & C. 481; *Langton* v. *Horton*, 1 Ha. 554.) Every such assignment was considered in equity as in its nature amounting to a declaration of trust, and to an agreement to permit the assignee to use the name of the assignor to recover the debt: (Story, sec. 1040.) As said by Spragge, C., in *Farquhar* v. *City of Toronto*, (12 Grant, 186): "It is clear from the cases, that the assent of the holder of a fund or debtor upon whom an order to pay is given is not necessary to an equitable assignment, whatever may be the case at law." (See also *Row* v. *Dawson*, 1 Ves. Sr. 131; *Roddick* v. *Gandell*, 1 D. M. & G. 775; *Ex parte*

South, 3 Swan, 393; *Foote* v. *Mathews*, 4 Grant, 366; *In re Pole's* Trusts, 2 Jur. N. S. 685; *In re Way's* Trusts, 5 New R., 67; *Sichel* v. *Raphael*, 5 New R. 149.)

Principles of Equity recognized at Law.

The rules which were applied by Courts of Equity to assignments of choses in action, have also to a great extent, governed Courts of Common Law, both before and since the passing of the Statute 35 Vic., c. 12, the effect of which statute is to allow the assignee of a chose in action to sue therefor at law in his own name. Courts of Law have recognized equitable principles, as shewn in the first chapter, as far as they were adapted to the common law system of procedure, and assigned rights of action could be sued for at law, only that the assignor's name would have to be used in bringing the action; he acting in the suit as trustee for the assignee. In other respects, a marked similarity will be found between the doctrines which were applied in the Courts of both Common Law and Equity respectively to the assignment of choses in action. Thus, in equity a part of a debt can be assigned, (*Smith* v. *Everett*, 4 Bro. Ch.; *Lett* v. *Morris*, 4 Sim., 607,) and the same rule has been upheld in our Court of Common Pleas in this Province. (*Wellington* v. *Chard*, 22 U. C. C. P., 518.) So, when the assignee does not take the beneficial interest in the debt transferred to him, it has been held equally at law and in equity that there is no valid assignment. (Story, sec. 1040d.; *Wood* v. *McAlpine*, 1 Tupper, App. R., 234.) Again, in certain cases, the policy of the law being opposed to certain assignments, on the ground of champerty or maintenance, or because these assignments are opposed to public policy, they are held to be void in Courts of Equity and of Common Law. (See Story, sec. 1047e.; *Reiffenstein* v. *Hooper*, 36 U. C. R. 295.) This will be seen in the Chapter on Maintenance and Champerty in this work, in

which the cases, indiscriminately taken from Law and Equity Reports, show a harmony of doctrine in respect to these subjects. It is well, therefore, in considering cases at common law and under the statute, to view how equitable principles have governed the assignment of choses in action, and on a close scrutiny and comparison of the decisions, the strong similitude which pervades them will be realized. At the same time it must be remembered that at an early period, (as will be seen by reference to the introductory chapter,) Courts of Common Law ignored altogether the assignment of choses in action. Equity is the fountain head whence the origin of the assignability of debts and other choses in action, as now recognized, is derived; the principles which were developed in Courts of Equity are those of which the Statute 35 Vic., cap. 12, is the embodiment.

Contracts against public policy.

As instances of the contracts against public policy, which have been held in equity to be void, may be mentioned the following:—An officer in the army will not be allowed to pledge or assign his commission: Story, sec. 1047 *e.*; this doctrine has also been applied to the compensation granted to a public officer for the reduction of his emoluments, or the abolition of his office, who by the terms of the grant might be required to return to the public service. (See *Spooner* v. *Payne*, 16 Jur., 367.) In like manner the profits of a public office would seem upon grounds of public policy not assignable. (*Hill* v. *Paul*, 8 Cl. and Fin. 295, 307; *Palmer* v. *Bate*, 2, Brod. and Bing., 673; *Davis* v. *Duke of Marlborough*, 1, Swanst., 79; but see *Arbuthnot* v. *Norton*, 5 Moore, P. C., 219.) However, as regards pensions, which are granted purely for past services, without any obligation to perform future services, the authorities strongly support the right of

assignment of them. *Stone* v. *Lidderdale*, 2 Anst. R., 533. *Tunstall* v. *Boothby*, 10 Sim., 549. *Ex parte Battine*, 4 B. & A., 690. But see *Flarty* v. *Odlum*, 3 T. R., 681, and Story's Equity, sec. 1047 f.)

The cases which come within the rules against maintenance and champerty are of such importance that they are treated of in a separate chapter hereafter, so that no space will be given to their discussion in this part of this work.

What Constitutes an Assignment.

In order to constitute an assignment of a debt or other chose in action in Equity no particular form is necessary. Any order, writing, or act which makes an appropriation of a fund, amounts to an equitable assignment of a debt. (Story, sec. 1047). It does not even need to be in writing. (*Buntin* v. *Georgen*, 19 Grant, per Spragge, C., at page 168. *Gurnell* v. *Gardner*, 9 Jur. N. S., 1220.) However, there must be a particular fund which is dealt with, and there must be a specific appropriation of the whole, or some part of that fund. (*In re Thornton*, 13 L. T. N. S. 568; *Watson* v. *Duke of Wellington*, 1 Russ and M. 602; *Lambe* v. *Orton*, 1 Dr. and Sm. 125; *Farquhar* v. *City of Toronto*, 12 Grant 186).

Thus, a writing in this form, "You will please hand B. £102 and charge the same to the debit of my account with you" was held, not to be an equitable assignment, but that it was only a mere money order, and could not have any secondary operation as an equitable assignment. (*In re Farrell*, 10 Ir. Ch. R. 304.)

And another in these words: "My dear Friend,—As I shall leave to you the distribution of the prize money, as soon as it shall be issued for me, I have to mention that the executors of Mr. Sims are claimants on that fund for a

bond debt with interest," was held, not to import a direction to pay the debt (although the fund was sufficiently pointed out) and it was therefore held, that there was no assignment. (*Watson* v. *Duke of Wellington*, 1 Russ & M., 602).

A letter to pay the share "to which I am entitled," or "which is due me," to certain persons named in the letter, was held to sufficiently indicate the fund, and therefore, a good assignment (*Lambe* v. *Orton*, 1 Dr. & Sm., 125).

And another in this form: "I hereby authorize you to pay A.B. the sum of £365, being the amount of my contract, he having advanced me that sum." was held to be valid, (*Diplock* v. *Hammond*, 5 De G. McN. & G., 329).

"Please take notice that I wish to transfer my interest in the policies," to C. D., was held valid, (*Chowne* v. *Baylis*, 31 Beav. 351).

An order in this form: "Pay Mr. James Farquhar the sum of $278.05, due from me to him on account of work done to Registrar's office on Court street," was held to sufficiently point out the fund assigned, (*Farquhar* v. *City of Toronto*, 12 Grant, 186).

See also the forms in *Foote* v. *Matthews*, 4 Grant, 466, and *Robertson* v. *Grant*, 4 Chamb., R. 331.

The entry of a memorandum in an account book by an assignee that certain debts were transferred, is a sufficient assignment, (*Kerr* v. *Read*, 23 Grant, 525).

An undertaking to "pay over" certain dividends was held to be a good assignment, (*in re Irving*, L. R., 7 Ch., D. 419).

A covenant to insure for the benefit of an incumbrancer operates as an equitable assignment of the policy of insur-

ance when effected, and binds the insurers on notice to them, (*Greet* v. *Citizens' Insurance Co.*, 27 Grant., 121).

The drawing of a bill of exchange by a creditor on a debtor, in favor of a third person, is not an equitable assignment of a fund being directed towards payment of a debt, (*Thompson* v. *Simpson*, L.R., 6 Chy., 659; *Shand* v. *Du Buisson*, L.D., 18 Eq., 283).

In the latter case, Bacon, V.C., said, at p. 288: "It is entirely new to me to hear, that a bill of exchange in an ordinary mercantile transaction can amount to an equitable assignment of the debt. The note might have been endorsed to any individual or any number of persons who might have endorsed it in succession. A mercantile instrument it is in its origin and in that shape it remains, and has no other vitality or effect, and to call it an assignment of a debt would be to call it not by its proper name."

It may here be mentioned that both bills of exchange and promissory notes are expressly excepted from the provisions of the Rev. Stat. Ont. cap. 116. See sec. 12 of this Statute.

Neither is a cheque on a banker an equitable assignment of the fund in the banker's hands, nor is a banker who dishonours a cheque liable to a suit in equity. (*Hopkinson* v. *Foster*, L. R. 19 Eq. 74; see also *Keen* v. *Baird*, 8 C. B. N. S., 372.) But where a fund is indicated and an order is drawn for a part or the whole of it in the hands of the drawee, this has always been held in equity to be an assignment of the debt, independent of the consent of the debtor, which consent was never required. So if a remittance be made to a bailee of a bill to collect the amount, and also to pay proceeds to a third party, this will also be considered an equitable assignment. (*Ex parte South*, 3 Swanst. 393;

Lett v. *Morris*, 4 Sim. 607; *Ex parte Alderson*, 1 Mad. 53; *Diplock* v. *Hammond*, 5 DeG. McN. & G. 320; *Collyer* v. *Fallon*, T. & R. 459; *Adams* v. *Claxton*, 6 Ves. 230; *Row* v. *Dawson*, 1 Ves. Sen. 331; *Priddy* v. *Rose*, 3 Meriv. 86; *Pell* v. *London & N. R. Co.*, 15 Beav. 548; *In re Pole's* Trusts, 2 Jur. N. S. 685; *In re Way's* Trusts, 5 New R. 67; *Sichel* v. *Raphael*, 5 New R. 149; *Foote* v. *Mathews*, 4 Grant 366; *Buntin* v. *Georgen*, 19 Grant 167, and other cases above cited.)

In cases of *donatio mortis causa*, when a chose in action forms the subject to be disposed of, delivery of some document essential to the recovery of the chose in action is sufficient. (*Moore* v. *Darton*, 4 DeG. & Sm. 519.)

It is necessary, in case of an assignment, that the assignee should on his part consent to it, which consent will be implied from his conduct; it will even be presumed. Until the assignee does consent, the assignor may revoke the assignment or withdraw the direction given the bailee as above mentioned; a mere mandate, therefore, from a principal to his agent not communicated to a third person will give such third person no right in the subject of the mandate. (*Scott* v. *Porcher*, 3 Mer. 662; see also *Acton* v. *Woodgate*, 2 M. & K. 462; *Wallwyn* v. *Coutts*, 3 Mer. 707, 708; *Gaskell* v. *Gaskell*, 2 Y. & Jerv. 502; *Maber* v. *Hobbs*, 2 Y. & C. 317; *Glegg* v. *Rees*, L. R. 7 Ch. 71; *Morrell* v. *Wootten*, 16 Beav. 197.) But once that the third person for whose benefit the mandate is made signifies his assent, (no revocation having been made,) such third person can enforce the assignment as against the agent. (*Hassel* v. *Smithers*, 12 Ves. 119.)

Conditional Assignment.

Although an order on a fund operates as an equitable assignment of that fund, still if the assignee does not obtain the order unconditionally, but a condition is attached

to his acceptance of the order, he cannot take the benefit of the assignment when the condition is not observed by him. Thus where A. accepted from B. an order on C. for a debt due by C. to B., and A. agreed on the order being paid by C. to give up his claim against B., and if not paid to return the order to B., and he then subsequently instituted proceedings against B., it was held, that he could not afterwards proceed to enforce his equitable demand against C. (*Muir* v. *Waddell*, 14 Grant 488.)

Voluntary Assignments.

The case of *Kekewich* v. *Manning*, 1 DeG. M. & G. 176, has established that a voluntary assignment of an equitable interest, or of a chose in action, will be enforced in equity, where the assignee has done all in his power to make the transaction complete. The fact that the legal estate cannot pass in such a case is held to be immaterial. (*Voyle* v. *Hughes*, 2 Sm. & Giff. 18.) So if A. should direct his debtor to hold the debt in trust for B., and the debtor should accept the trust and communicate the fact to both A. & B., the trust, although voluntary, would be enforced in favour of B. and binding on A., for nothing remains to be done to fix the trust. (Story, sec. 973; *McFadden* v. *Jenkins*, 1 Ph. 152; *Stapleton* v. *Stapleton*, 14 Sim. 186.) Such an assignment will also be binding on the assignee's executors. (*Pearson* v. *Amicable Society*, 6 U. C. L. J., N. S. p. 119.)

A fortiori a voluntary bond which has been assigned for valuable consideration will be binding on the obligor. (*Payne* v. *Mortimer*, 6 U. C. L. J., N. S., p. 119.)

But a voluntary assignment of a chose in action is not good as against the creditors of the assignor. (*Gott* v. *Gott*, 9 Grant 165.)

Assignee entitled to Collateral Securities.

Where the assignor has collateral securities for the debt which he assigns, the assignee will be entitled to the full benefit of such securities, unless it is otherwise agreed between the parties. (Story, sec. 1047a; see also *dictum* of Harrison, C. J., in *Cole* v. *Bank of Montreal*, 39 U. C. R., at page 74.) And this rule extends even to mortgages of real estate, for, as said by Lord Mansfield in a Common Law case, *Martin* v. *Mowlin*, 2 Burr 969, 979: "A mortgage is a charge upon the land, and whatever would give the money would carry the estate along with it to every purpose." However, this latter rule is doubtful. (See *Austin* v. *Boulton*, 16 U. C. C. P. 318.)

Assignment subject to Equities.

The assignee being generally entitled to all the remedies of the assignor, so he is generally subject to all the equities between the assignor and his debtor, (*Priddy* v. *Rose*, 3 Meriv,. 86; *Coles* v. *Jones*, 2 Vern., 692; *Turton* v. *Benson*, 1 P.W., 496; *Mangles* v. *Dixon*, 3 H. L. cases, 702; *Tooth* v. *Halkett*, L.R. 4, Ch. 242; *Graham* v. *Johnson*, L.R. 8, Eq. 36; *McPherson* v. *Dougan*, 9 Grant., 623; *Smart* v. *McEwan*, 18 Grant, 623; *Gould* v. *Close*, 21 Grant, 273; *Elliott* v. *McConnell*, 21 Grant, 276.) The purchaser of a chose in action cannot take any other or different title than that held by the vendor, so, when the title of the assignor can be impeached or set aside at the instance of the debtor, the assignee's title fails *Cockell* v. *Taylor*, 15 Beav. 103; *Ord* v. *White*, 3 Beav, 357; *Clack* v. *Holland*, 19 Beav., 262; *Dickinson* v. *Burrell*, L.R,, 1 Eq., 337). And thus, where a judgment or other debt is paid, and then, after payment is assigned to a third party, the assignee takes nothing, or, as has been tersely expressed, "Where nothing is assigned, the assignee is the assignee of nothing"

(*Hill* v. *Boyle*, L.R., 4 Eq., 260). But see *Cole* v. *Bank of Montreal*, 39 U.C. R., cited in Chapter IX.

Yet the parties to an original contract may by express stipulation, or by implication arising from their conduct, agree that a chose in action may be assigned free from such equities, and, in that case, the assignee will take the chose in action discharged from such equities accordingly. (*In re Agra and Masterman's Bank*, L.R., 2 Ch., 391; *in re Blakely Ordnance Co.*, L.R., 3 Ch., 154; *in re General Estates Co.*, L.R., 3 Ch., 758; *in re Northern Assam Tea Co.*, L.R., 10 Eq., 458).

The following case is an instance of this latter rule. A bank gave to D. T. & Co. a letter addressed to them, and expressed thus: "No. 394. You are hereby authorized to draw on this bank to the extent of £15,000, and such drafts I undertake only to honor on presentation. This credit will remain in force for twelve months from its date, and parties negotiating bills under it are requested to indorse particulars on the back thereof." D. T. & Co. drew bills under this letter to the amount of £6,000, and endorsed them to the appellant who duly endorsed particulars on the letters of credit. The bank was afterwards ordered to be wound up, and D. T. & Co. were indebted to the Bank to an amount exceeding what was due on the bills. It was held, that whatever might be the effect of the letter of credit at law, it constituted a contract to the benefit of which all persons, taking and paying for bills on the faith of it were entitled in Equity without regard to the equities between the Bank and D. T. & Co., and that the appellant was entitled to prove for the amount due on the bills without regard to the state of the account between the Bank and D. T & Co. As said in the judgment of the Court, at page 397: "Generally speaking, a chose in action * * * * * * must be assigned subject

to the equities existing between the original parties to the contract, but this is a rule which must yield when it appears from the nature of the terms of the contract that it must have been intended to be assignable free from, and unaffected by such equities." *In re Agra and Masterman's Bank*, L.R., 2 Ch., 291.

It is also said in Taylor's Equity (sec. 877.) that length of time and circumstances may make the case of the assignor stronger.

Notice of Assignment.

The rule of priority which governs transfers and charges of a legal estate, governs also in the absence of a special equity transfers and charges of an equitable interest. But if legal and equitable titles conflict, or if, in the absence of a legal title, there is a perfect equitable title by conveyance on the one hand, and an imperfect one by contract, on the other, priority is given to the legal title, or, if there is no legal title, to the perfect equitable one. This is in accordance with the maxim "Where the equities are equal, the law will prevail," (Adam's Equity, 147).

The general rule in England and in many of the United States is, that notice should be given to the debtor in order to make the chose in action valid, as against third persons or attacking creditors or subsequent assignees without notice. See list of authorities cited in Perry on Trusts, 2nd edition, page 526. It seems to be agreed in all cases that if the debtor, without notice, and in good faith, pays the debt to the assignor, it will be a good payment, and discharge him from further liability, (*Mangles* v. *Dixon*, 13 Eng. Law & Eq., 82; *Stocks* v. *Dobson*, 4 De. G. M. & G., 11), but if he should pay after notice, he would apparently still be liable to the assignee, (See *Foster* v. *Blackstone*, 1 M. & C., 297; *Tinson* v. *Ramsbottom*, 2 Keen, 35; *Meux* v.

Bell, 1 Hare, 73; *Dearle* v. *Hall*, 3 Russ., 1; *Buller* v. *Plunkett*, 1 J. & H., 441; *Felthham* v. *Clarke*, 1 D. & S., 307; see *Green* v. *Ingram*, L. R., 2 C.P., 575).

Under the Insolvent Acts which have been in force in Canada, and under the English Bankruptcy Act, notice to the world was given by the insolvency proceedings, so that the title of the assignee in insolvency prevailed as against that of an assignee of the debt taken in after the insolvency. (See *re Bright's Settlement*, L.R, 13 Ch., 465.)

A trustee who receives notice of assignment of the trust fund, made by the *cestui qui trust* is not, in the absence of inquiry, bound to inform the person giving him notice, that he himself has a prior assignment. By omitting, to give that information, the trustee will not lose his own priority. W. and A. were appointed joint receivers in a partnership suit, and were ordered (after payment of costs) to pay the residue of the money received by them to the parties according to their respective right. L., one of the partners, afterwards assigned his share of the moneys to W. in consideration of advances made by him. After this, L. signed an order to W. requesting him to pay "the balance of money due to me," to G. W. accepted this order in writing, undertaking thereby to pay "the balance due to you," to G. It was held, that "the balance" intended, was the balance remaining after satisfying W.'s own claim. *In re Lewer*, L.R., 4 Ch. D., 101; 5 Ch. D. 61.

There seems to be no case directly in point as to whether, as between the assignee and the debtor, (when there is no question of priority), notice is necessary, but in *Farquhar* v. *The City of Toronto*, 12 Grant, 186, the Court intimated that in such case there was no necessity for notice.

Future and contingent rights assignable.

Possible and contingent interests are, to a certain extent, assignable in Equity, on the same principle as choses in action, (*Holroyd* v. *Marshall*, 10 H.L., cases 191). A contingent legacy or other interest may be made the subject of an equitable assignment, although at the time of the assignment it is a mere expectant possibility, with the distinction that as choses in action may be completed by a constructive deliver: in the cases of possibilities, the interest, though substantial, is, for the time being, non-existent, but there are no means of perfecting the possession by notice or otherwise, but the contract remains *in fieri* until the right of action arises, (*Meek* v. *Killwell*, 1 Hare, 464).

It matters not whether a fund is existing or to be brought into existence, it is assignable in equity. (See *Buntin* v. *Georgen*, 19 Grant, per Spragge, C., at p. 171.) So the assignment of freight to be earned in future is valid, and also the future cargo of a whale ship. (*Leslie* v. *Guthrie*, 1 Bing. N. C. 697; *Douglas* v. *Russell*, 4 Sim. 524; *In re Ship Warre*, 8 Price 269; *Curtis* v. *Auber*, 1 Jac. & Walk. 526; *Robinson* v. *McDonell*, 5 M. & S. 228; *Langton* v. *Horton*, 1 Hare 549; *In re Irving*, L. R. 7 Ch. D. 419.)

Assignment of debt charged on land not subject to registration laws.

Wherever an assignment is made of a debt or other personal property, although it is charged on land, as for example, a pecuniary legacy charged on land, the assignment will be treated as an assignment for money only, and therefore it will not be affected by the policy of the registration laws, by which conveyances of the interests in land require to be registered. (Story, Eq., sec. 1055.) This question is discussed in chap. v. in regard to the assignment of mortgages.

Sequestration.

A species of assignment is the compulsory one by sequestration, by which method a chose in action can be reached in equity. (See *Irving* v. *Boyd*, 15 Grant 157; *Harris* v. *Meyers*, 2 Cham. R. 121.)

Specific Performance.

A Court of Equity has decreed specific performance of an agreement for the purchase of a debt. (*Wright* v. *Bell*, 5 Price 325. See also *Livingstone* v. *Wood*, 27 Grant 515).

Where Law affords remedy, Equity will not interfere.

Equitable assignments coming under the head of the concurrent jurisdiction of Equity, it has been the policy of Courts of Equity not to entertain suits relating to this class of cases unless some circumstances intervene which show that the assignee's remedy is or may be obstructed by the assignor, for as the Common Law formerly was, although the assignee might not sue in his own name in a court of law, he might use the name of the assignor. In *Ross* v. *Munro*, (6 Grant 431,) Esten, V.C., says, at p. 464, that the assignee "must show the existence of some difficulty or obstacle in his way to prevent him from recovering at law, such as the refusal of the assignor to permit the use of his name, or a threat on his part to execute a release of the debt, or interfere in some way with its recovery."

In *Hammond* v. *Messenger*, (9 Sim. R. 327,) Shadwell, V.C., says: "If this case were stripped of all special circumstances it would be simply a bill filed by a plaintiff who had obtained from certain persons, to whom a debt was due, a right to sue in their names for the debt. It is quite new to me that in such a simple case as that, this Court allows, in the first instance, a bill to be filed against

the debtor by a person who has become the assignee of the debt. I admit that if special circumstances are stated, and it is represented that, notwithstanding the right which the party has obtained to sue in the name of the creditor, the creditor will interfere and prevent the exercise of that right, this Court will interpose for the purpose of preventing that species of wrong being done; and if the creditor will not allow the matter to be tried at law in his name, this Court has a jurisdiction in the first instance, to compel the debtor to pay the debt to the plaintiff; especially in a case where the act done by the creditor is done in collusion with the debtor. If bills of this kind were allowable, it is obvious that they would be pretty frequent; but I never remember any instance of such a bill being filed unaccompanied by special circumstances." (See also *Rose* v. *Clarke*, 1 Y. & C. 446.)

It may also be observed that Equity will not entertain a bill to restrain an assignee of a chose in action from assigning it, or to declare the rights of the parties thereon, that is, in those cases where the chose in action is assignable subject to all equities. An assignee at best can in these cases only re-assign it, subject to such equities, so that the equities of the debtor remain unimpaired and equitable relief is unnecessary. (See *Cogswell* v. *Sugden*, 24 Grant 474.)

CHAPTER IV.

ASSIGNMENTS AT COMMON LAW AND UNDER THE STATUTE.

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Assignment of Contracts and Choses in Action forbidden at Common Law.

From an early period, until the passing in the year 1872 of 35 Vic., cap 12. (Rev. Stat. Ont., cap. 116, secs. 6 to 12 inclusive), it was the settled doctrine at common law that choses in action were not assignable so as to enable the assignee to sue for them in his own name, (See Chapter I). As said in Addison on Contracts: "The common law in times past, discountenanced the assignment of all rights and causes of action, as tending to increase maintenance and litigation, and would not consequently suffer the right to the fulfilment of a contract of a personal nature, to be transferred from hand to hand. The performance of a contract for work might be delegated to a subordinate agent or servant, but not the right to sue upon the con-

tract. Thus, where A. being employed by the defendant to transport goods to a foreign market, delegated the entire employment to the plaintiff, and the plaintiff having performed all that A. had undertaken to perform, brought his action against the defendant for the stipulated remuneration, it was held that there was no privity between the plaintiff and the defendant, that he was not a party to the contract, and could not sue upon it. If an order was given to A. for the supply of goods, and B. stepped in and executed it by the authority of A., he was taken to execute as the agent of A., and could not himself sue for the price of the goods, unless before the goods had been received and consumed by the intended purchaser, he had given notice to the latter, that he had himself supplied them and looked to him for payment. If, after the receipt of such a notice, the party giving the order accepted the goods, he was then taken to have entered into a new contract for the purchase of them from the party to whom the execution of the original order had been delegated. But latterly, the ancient rule of law had evaporated to a mere shadow. It no longer prevented the assignee from suing, but regulated merely the form of his action. He could not sue in his own name; but he was, in general, permitted to bring his action and recover, in the name of the original assignor, the party with whom the contract was entered into." (See also *Martin* v. *Miller*, 4 T. R., 340; *Legh* v. *Legh*, 1 B. & P., 447; *Alner* v. *George*, 1 Camp., 392; *Balfour* v. *The Sea Insurance Co.*, 3 C.B., N. S., 305; *Brant* v. *Heating*, 2 Moore, 184; *Pickford* v. *Ewington*, 4 Dowl., 453; *Hutchinson* v. *Haywortli*, 9 A. & E., 375; *Morrison* v. *Parsons*, 2 Taunt., 407; *Westoby* v. *Day*, 2 E. & B., 605; *Arden* v. *Goodacre*, 11 C. B., 883; *Ham* v. *Ham*, 6 U. C. C., P. 37; *Whitehouse* v. *Roots*, 20 U. C. R., 65-78; *Eakins* v. *Gawley*, 33 U. C. R., 178; *Sterling* v. *McEwan*, 18 U. C. R., 465; *Dennison* v. *Knox*, 24 U.C.R., 119; *Blair* v. *Ellis*, 34 U.C.R., 466).

It was customary, formerly, in assignments of debts, to insert a covenant on the part of the assignor, that the assignee might use the name of the assignor, but the assignee had also an implied right of this kind when there was no stipulation to the contrary. (*Wood* v. *Griffith*, 1 Swanst., 55; see *Riddell* v. *Riddell*, 7 Sim., 529).

Exceptions to Common Law Doctrines.—Statutory changes.

There were certain exceptions to the rule at law against the assignment of choses in action, namely, such as that relating to assignments to and from the king and others, which are referred to in the introductory chapter. These exceptions were formed to suit the necessities which from time to time arose, until at last it was found that a statute completely abolishing the ancient general rule was required, and we now have debts and choses in action assignable at law as freely as they are in equity. About the only discernible differences are, that under the statute the assignment needs to be in writing, while a verbal assignment can be sued on in equity, and the statute is confined to choses in action "arising out of contract," while claims arising out of tort can, under certain circumstances, be the subject of equitable assignment. (See *Moberly* v. *Brooks*, 27 Grant, 270, cited in the chapter on Maintenance and Champerty.) However, even in these cases it is suggested that another statute may possibly further supply the deficiency at common law. By the 2nd section of the Administration of Justice Act of 1873, (see Rev. Stat. Ont., cap. 49, sec. 4.) an equitable "purely money demand" can be sued for at law, and perhaps, *any* assigned debt or chose in action answering the description of "a purely money demand," (and which may be sued for in equity), will, under the provisions of this latter Act, be entertained in courts of common law. The question thus mooted has not been expressly

decided, although in *Blair* v. *Ellis*, (34 U. C. R., 178), and *Cole* v. *Bank of Montreal*, (39 U. C. R., 54), the assignments of the choses in action which were sued for in these cases, seem to have been upheld, as much by virtue of the one statute as by the other. But these necessarily answered the description of choses in action, "arising out of contract," and the assignments were in writing.

Besides these cases see the following as to the meaning of the words, "purely money demand," (*Howell* v. *McFarland*, 2 Tupper App. R., 45; *Parkinson* v. *Clendenning*, 29 U. C. C. P., 13; *Hope et al.* v. *Ferris*, 30 U. C. C. P., 520.)

Verbal Assignment.

In the common law case of *Tibbits* v. *George*, 5. A. & E., 117, it was held, that a verbal assignment passed the equitable interest of the assignor. See also Chapter on Equitable Assignments.

Novations.

There was a distinction under the former law made between the assignment of a chose in action and cases where the assignor, assignee, and debtor met, and it was agreed between the three parties, that the debtor would pay the assignee the sum due the assignor. In cases of this kind, the assignee could sue the debtor upon a direct promise, as privity of contract was thus established between the assignee and debtor. So, if the debtor having notice of an assignment of the debt due by him, assented to such assignment, he would be sued upon an implied promise resulting from such assent. Such cases were called Novations. (See *Israel* v. *Douglas*, 1 H. Black, 239; *Williams* v. *Everett*, 14 East, 582; *Crowfoot* v. *Gurney*, 9 Bing, 372; *Walker* v. *Rostrom*, 9 M. & W., 411; *Hodgson* v. *Anderson*, 3 B. & C., 842; *Baron* v. *Husband*, 4 B. & A., 611; *Tatlock* v.

Harvis, 3 T. R., 180; *Fairlie* v. *Denton*, 8 B. & C., 395; *Brice* v. *Bannister*, L. R. 3, C. & B., 569.)

In *Smith* v. *The Corporation of Ancaster Township*, 45 U.C.R. p. 89, Osler, J., referring to *Mitchell* v. *Goodall*, (44 U. C. R., 398), said: "In that case, and in *Brice* v. *Bannister*, L. R., 3 Q. B. D., 569, also cited and relied upon, there was the further allegation that the defendant accepted the order or assignment, which, though not necessary to complete the plaintiff's equitable title as assignee of a chose in action, might be read as an avowment of an express promise by the debtor to pay the assignee."

In *Griffin* v. *Weatherly*, L. R., 3 Q. B., 758; Lord Blackburn says: "Ever since the case of *Walker* v. *Rostrom*, 9 M. & W., 411, it has been considered as settled law that where a person transfers to a creditor, on account of a debt, whether due or not, a fund actually existing or accruing in the hands of a third person, and notifies the transfer to the holder of the fund, although there is no legal obligation on the holder to pay the amount of the debt to the transferee, yet the holder of the fund may, and if he does pay to the transferee, then that which was merely an equitable right becomes a legal right in the transferee, founded on the promise, and the money becomes a fund received or to be received for and payable to the transferee, and when it has been received an action for money had and received to the use of the transferee lies at his suit against the holder." (See also *Mitchell* v. *Goodall*, 44 U. C. R., 398; S. C., 4 Tupper's App. R., 564).

Equitable principles introduced into Common Law.

Not only was the doctrine of equitable assignment recognized at common law, so that assignors might sue for the benefit of the assignees of choses in action, but equitable

defences having been introduced into common law actions in the manner mentioned in the Introductory Chapter, equitable principles pervaded the cases at common law. Thus, a defendant having pleaded a set off, plaintiff replied on equitable grounds, that the moneys sued for, were before action and before the alleged set-off had accrued, assigned for value by the plaintiff to D. and by D. to C., that defendant had notice of both assignments before the set-off had accrued, and that the action was brought for C.'s benefit, the plaintiff being only a plaintiff in name. On demurrer the replication was held good. *Dennison* v. *Knox*, 24 U. C. R., 119. See also *Whitehouse* v. *Roots*, 20 U. C. R., 65-78, and ante page 6 and the cases there mentioned.

It will thus be seen that choses in action were, even before any statutory enactment, assignable in law as in equity, the only difference being that of form. In equity the assignee could bring the suit in his own name without making the assignor a party (see Con. Gen. Ord. Chy., 59; Calvert on Parties, 2nd ed., pp. 325), while at law he could sue only in the name of the assignor.

The Statute 35 Vic., Cap. 12.

The Act entitling the assignee to sue at law in his own name is, 35 Vic., cap. 12, (Rev. Stat. Ont., cap. 116, sections 6 to 12 inclusive.) By the 7th section of the Revised Statute, it is enacted that "Every debt and chose in action arising out of contract shall be assignable at law by any form of writing, but subject to such conditions or restrictions with respect to the right of transfer as are contained in the original contract: and the assignee thereof shall sue thereon in his own name in such action and for such relief as the original holder or assignor of such *chose in action* would be entitled to sue for in any Court of Law in this Province, 35 Vic., c. 12, s. 1."

The word "assignee" is interpreted in the sixth section, which enacts, that it "shall include any person now being or hereafter becoming entitled by any first or subsequent assignment, or any derivative or other title to a *chose in action*, and possessing, at the time of action brought, the beneficial interest therein and the right to receive and give an effectual discharge for the monies or the charge, lien, incumbrance or other obligation thereby secured. 35 Vic., c. 12, s. 1."

Statute retrospective.

It is to be observed that these sections apply to assignments made and causes of action accrued before, as well as after, the passing of the Act. (*Wallace* v. *Gilchrist*, 24 U. C. C., P. 40).

Assignment must possess beneficial interest.

When a claim was assigned to the plaintiff in a suit for a nominal consideration, and he sued (as it appeared from the evidence) merely in the interest of another party, it was held that he could not recover. An amendment was applied for in this case, to allow the name of the party beneficially entitled, to be inserted as plaintiff, but the court held, that as the case would have to be sent down for a new trial, and that this would only be done on payment of all costs, making it substantially a new suit, no benefit could be conferred on the proposed plaintiff, and the amendment was therefore refused, (*Wood* v. *McAlpine*, 1 Tupper App. R., 234; see also *Miall* v. *Western Insurance Co.*, 19 U. C. C., P. 270).

Assignee only can sue when Assignment complete.

When an assignment is complete, the only person who can sue is the assignee; just as before the Act, the assignee could not sue in his own name, so now, once that

the assignment is complete the assignor cannot, but the assignee alone can sue. Therefore, a plea to the effect that the cause of action was assigned to a third party, was held good as an assertion of the absolute divesting of the plaintiff's interest in the chose in action, (*Wellington* v. *Chard*, 22 C., P. 158).

Assignor can still sue in his own name in certain cases.

But the assignor may sometimes retain a beneficial interest in the debt and may still, under certain circumstances, sue in his own name. Thus, a writing in this form: "I hereby assign the within award in this matter to W. N., to secure payment of the sum of $130, this day lent and advanced by him to me, and I hereby authorize him *in my name* to take all necessary steps for the collection of the amount of said award *for me*, and retain thereout his $130," and which bore the following endorsement by another party jointly interested in the award: "I affirm the above assignment, and admit it assigns all my interest in the said awards." It was held not to be an assignment of the award to prevent the assignor suing in his own name, because it appeared he was not parting with his whole interest in it, but that he was merely pledging it as a security for considerably less than the amount of it. Besides, the words in italics showed that any action to enforce the award was to be brought in the name of the assignor, merely reserving to the assignee the conduct of the suit in the name of the assignor, as before the statute, and giving him the right to retain a portion of the moneys when recovered. (*Hostrawser* v. *Robinson*, 23 U. C. C. P. 350. See also *Dawson* v. *Graham*, 41 U. C. R. 540.)

Part of Debt can be Assigned.

However, it is not to be understood from the last cited cases that a part of a debt cannot be assigned so as to en-

title the assignee to bring the action in his own name. It has been decided, that a part of a chose in action can be assigned so that the assignee can sue in his own name as to such part, and the assignor retain his interest in the remaining part. (*Wellington* v. *Chard*, 22 U. C. C. P. 518.)

Assignee takes subject to right of set-off and other defences.

The equitable rule, that the assignee of a chose in action takes it subject to such equities as exist between the assignor and the debtor, has its counterpart in section 10 of the Act, which is as follows; "In case of any assignment of a debt or *chose in action* arising out of contract and not assignable by delivery, such transfer shall be subject to any defence or set-off in respect of the whole or any part of such claim as existed at the time of or before notice of the assignment to the debtor or other person sought to be made liable, in the same manner and to the same extent as such defence would be effectual in case there had been no assignment thereof; and such defence or set-off shall apply as between the debtor and any assignee of such debt or *chose in action*. 35 Vic., c. 12, s. 5." But upon the principle, *modus et conventio vincunt legem*, the original parties may by express stipulation, or by implication arising from their conduct, agree that the chose in action may be assigned free from such equities; in such a case an assignee will take a chose in action discharged from such defences accordingly. Or the assignee may be released by the conduct of the debtor after assignment. (See *Dickson* v. *Swansea Vale Ry. Co.*, L. R. 4 Q. B. 44; *Higgs* v. *Northern Assam Tea Co.*, L. R. 4 Ex. 387. See also judgment in *Mackenzie* v. *Montreal, etc., Ry. Co.*, 29 U. C. C. P. 333.) It is sufficient if equities exist prior to the assignment; they need not exist at the inception of the debt. (Waterman on Set-off, p. 118). On this subject, the reader is referred to the

Chapter on Equitable Assignments. See also *Egleson* v. *Howe*, (3 Tupper App. R. 566,) overruling *Henderson* v. *Brown*, (18 Grant 79).

What can be assigned.

As we have already seen, a part of a debt can be assigned. A verdict can be assigned: (*Anderson* v. *Radcliffe*, E. B. & E. 817.) An expected award under an arbitration is assignable: (*Smith* v. *Jones*, 1 Dowl. N. S. 526.) A breach of covenant can, under certain circumstances, be assigned. (See Chapter IX.) A foreign judgment has been held to be a debt, and not merely evidence of a debt, and it is therefore assignable. *Fowler* v. *Vail*, 27 U. C. C. P. 417, the authority for this rule, was partly reversed on appeal, (4 Tupper App. R. 267,) but not on this point. (See also *Williams* v. *Jones*, 13 M. & W. 628, and *Godard* v. *Gray*, L. R. 6 Q. B. 139.) A tort is not assignable, but after it has been sued upon and becomes merged into a judgment it is assignable like any other judgment debt. (*Ex parte Charles*, 14 East 197: see *Simpson* v. *Lamb*, 7 E. & B. 84, and opinion of Maule, J., in *Beckham* v. *Drake*, 2 H. L. cases 579.) Rights of action for tort are assignable in some of the American States. (See Burrill on Assignments, page 131). These particular matters are given as instances of what may be the subject of assignment in addition to the other choses in action which appear in the various cases cited throughout this work. Reference may also be made to the next chapter, where certain choses in action are governed, in reference to their assignment, by rules peculiar to themselves. These choses in action are also in great part governed by the rules explained in this and the preceding chapters. How far they are so governed, will be seen by comparison of them to the statute and the decided cases.

Future interests assignable.

It is no objection to an assignment that the right did not exist at the time when assigned, as future rights can be made the subject of transfer. (*The "Wasp,"* L. R. 1 Adm. & Eccl. 367; *Smith* v. *Jones*, 1 Dowl. N. S. 526.) See preceding chapter. The subject of the transfer of after acquired property is discussed at length in the recent work of Mr. Barron on Bills of Sale and Chattel Mortgages, (pages 36 to 47). See also the recent case of *Mitchell* v. *Goodall*, (44 U. C. R. 398; S. C., 4 Tupper's App. R. 564).

Voluntary assignments.

Like other fraudulent and voluntary conveyances, a voluntary assignment of a chose in action is voidable at the suit of a creditor. (*Norcutt* v. *Dodd*, 1 Cr. & Ph. 100; 5 Jur. 835.) See also ante Chapter on Equitable Assignments.

Larceny of a Chose in Action.

In this Chapter on Assignments, larceny may be treated as a criminal *quasi* assignment, made by the thief to himself. It was a rule at Common Law that larceny could not be committed of a chose in action, as a bond, bill of exchange, etc. (Byles on Bills, 6th ed., p. 139; *Reg.* v. *Mead*, 4 Car. & P. 535; *Reg.* v. *Powell*, 2 Den. C. C. 403.) The reason of this rule seems to have been that stealing the evidence of a man's right does not interfere with the right itself, (per Lord Campbell, in *Reg.* v. *Watts*, 1 Dearsl. 332,) but now by the interpretation clauses of our Canadian Larceny Act, (sub-secs. 1, 2 and 4, of sec. 1 of 32-33 Vic., cap. 21,) the evidences of choses in action are made the subject of larceny as much so as any other chattel.

Garnishment of assigned Debts.

A debt duly assigned is not garnishable. (*Macaulay* v. *Rumbull*, 19 U. C. C. P. 284; *Hirsch* v. *Coates*, 18 C. B.

757; *Grant* v. *McDonell*, 39 U. C. R. 412; *Scott* v. *Lord Hastings*, 4 K. & J. 633.) And to make an assignment of a debt prevail over an attaching order it is not necessary that notice of the assignment should be given to the garnishee. (*Brown* v. *McGuffin*, 5 P. R. 231; *Robinson* v. *Nesbitt*, L. R., 3 C. P. 264.) But an omission to give notice will perhaps deprive the garnishee of his costs. (See *Grant* v. *McDonell*, 39 U. C. R. 412.) It is to be observed that while goods and chattels are bound from the delivery of an execution to the sheriff, choses in action are bound only from the time of the seizure. (*McDowell* v. *McDowell*, 10 L. J., U. C. 48.)

Assignments against Public Policy.

As explained in the previous chapter, an assignment which is considered against public policy is in equity held to be void. The same rule prevails at law. Thus, where a bond was given to a trustee by a husband and his surety to secure payment of alimony to the wife, in pursuance of a decree of the Court of Chancery, it was held not to be assignable by the trustee and the wife, such assignment being contrary to public policy and tending to lessen the inducement to reconciliation. (*Reiffenstein* v. *Hooper, et al.*, 36 U. C. R. 295-302. See also *Wells* v. *Foster*, 8 M. & W. 149.)

Right of Assignee to evidences of the assigned debt.

By the assignment of a bond, policy of insurance, or other instrument of contract, the right of property in the document itself passes to the assignee, so that an action is maintainable for the recovery of possession of the document. (*Watson* v. *McLean*, 1 Ell. Bl. & Ell. 77.) And where a debtor deposits with his creditor a title deed as security for a debt, the interest which the creditor thereby acquires in the deed may be assigned by him to a third person. (*Hobson* v. *Mellond*, 2 M. & Rob. 302.)

CHAPTER V.

PARTICULAR ASSIGNMENTS.

Insurance Policies.
Partnership Debts.
Stocks and Shares.
Mechanics Liens.
Bail Bonds.
Replevin Bonds.
Insolvency.
Bills of Exchange and Promissory Notes.
Covenants running with the land.
Mortgages.
Inchoate Rights.
Copyright.
Trade Marks.
Designs.
Patents.

In this chapter will be treated the transfer of particular choses in action, to which (owing to their different natures), rules peculiar to themselves are applicable. The general principles enunciated in other parts of this work, more or less govern the assignments herein referred to; as far as they so govern will be explained in the following pages, together with the modifications and particular requirements which are necessary to the assignment of each kind of chose in action.

Insurance Policies.

The rule which formerly prevented the assignee of a chose in action from suing in his own name, governed the assignment of insurance policies, even where the insurance company assented to the assignment. (See *Richards* v. *Liverpool and London Fire Insurance Company*, 25 U. C. R. 400; *Beemer* v. *Anchor Insurance Co.*, 16 U. C. R. 485; *Park* v. *Phœnix Insurance Co.*, 19 U. C. R. 110.) But the

assignee of a *mutual* insurance policy, upon the assignment being ratified and confirmed to him by the company, could sue in his own name. This was by virtue of statutory enactment. (See Rev. Stat. Ont., cap. 161, sec. 41.)

There are certain conditions to be complied with (according to the various policies of insurance companies), on the assignment of the policy. It is well settled, however, that such conditions only apply in the case of assignments before the happening of loss. Not to assignments after loss. There are a great many American cases to this effect, which are collected in Bates' Digest of Fire Insurance Decisions. In accordance with this rule, it has been decided that the assignment of a claim under a fire insurance policy, after loss has occurred, is not a breach of the ordinary condition without the license of the usurers. (*Kerr* v. *Hastings Mutual Insurance Company*, 41 U. C. R. 217. See also *Sadlers' Co.* v. *Badcock*, 2 Atk. 554; *Watts* v. *Canada Farmers' Insurance Co.*, L. J., U. C., Vol. III., N. S. p. 198; *Lloyd* v. *Fleming*, *Lloyd* v. *Spence*, L. R. 7 Q. B., 299.)

Yet there must be care taken that the condition against assignment is not violated, even after loss has happened. A distinction is to be observed between an assignment of the policy, and an assignment of the claim under the policy; between the contract, and the chose in action arising out of the contract. If there is a total loss, or if the loss is the whole amount of the insurance money, an assignment even of the policy in place of an assignment of the money would not be contrary to the usual condition, because there was to be and could be no further claim upon it. But if the loss is partial only, and less than the total sum insured for, it might not be safe to assign the policy; for, it might be contended that the assignment had destroyed not only the future insurance, but that it had created a forfeiture of the unpaid claim or cause of action for the past loss.

"The proper way," as remarked by Wilson, J. in *Kerr* v. *Hastings Mutual Insurance Company* (41 U. C. R., at page 224), "would be to assign only the money payable for and in respect of the loss which had accrued. And as such a transfer would be sufficient for the assignee in all cases, whether the loss was total or partial, or the whole of the insurance money had become payable or not, it is the safer form of transfer to adopt in every case after the loss has happened."

When an insurance is effected, "loss if any payable to a third party," this is not such an absolute assignment of the policy as will allow such third party to surrender the policy for cancellation (*Marrin, et al* v. *Stadacona Insurance Co.*, 4 Tupper App. R. 330).

The assignee of an insurance policy takes the same subject to the equities which exist in favor of the Insurance Company, and a breach of the conditions of the policy by the assignor will be fatal as against the assignee. Therefore, an assignee of a mutual insurance policy, the assignment to whom was consented to by the Company, was nevertheless held, not entitled to sue the company when the policy was subsequently assigned against the conditions of the company. (*Smith* v. *Niagara District Insurance Co.*, 38 U. C. R. 570. See also *Oxford Permanent Building and Saving Society* v. *Waterloo County Mutual Fire Ins. Co.* 42 U. C. R. 181.)

The assignment of a fire insurance policy to be valid must have some interest in the property to go with it. (Smith's Merc. Law, 416. See also *Kanady* v. *The Gore District Mutual Fire Insurance Co'y.* 44 U. C. R. 261.) But as to life policies, it is not necessary, (although the original holder or *insured* must possess an interest), that the assignee should have any interest. He need not even

give any consideration for the transfer. (*Ashley* v. *Ashley*, 3 Sim. 139). Another distinction is that in the transfer of a life policy, the consent of the insurers need not be obtained, which consent is necessary, as already explained in the case of transfer of a fire policy.

Partnership Debts.

Debts due to a partnership firm can be assigned by one of the partners, and the fact that such transfer is made by deed does not deprive it of its effect as a written contract. (*Howell* v. *McFarland*, 2 Tupper, App. R., 31.) The reasoning upon which this decision was arrived at is thus expressed by Patterson, J. in his judgment, at page 34. "Before the law recognized the assignment of choses in action like this account, it might have been necessary to procure the defendant's promissory note or acceptance for the amount, and to endorse or transfer it in order to assign the debt at law. It cannot be questioned that the ordinary partnership agency would have authorized one partner to take a note or draw a bill for the amount of the account, and afterwards to negotiate it, even though in doing so he made his co-partner liable as endorser. It would still be competent for one partner to do this, but the law has authorized a shorter mode of effecting one part of the transaction. It no longer requires a negotiable instrument to make the transfer valid at law, but enables that to be effected by any writing. The character of the partnership asset as between the partners is the same whether the debt is the subject of an express promise to pay it, contained in a negotiable instrument or contained in an instrument not negotiable, or rests merely on the legal liability without any express promise. The right to deal with it as between the partners is and always was the same; and now the power to transfer it at law is the same."

It has likewise been held that a man can assign a private

debt of his own to himself and his partner, entitling the firm to sue for it in their own names. (*Blair* v. *Ellis*, 34 U. C. R. 466.) This latter rule follows by analogy, sec. 19 of the Property and Trust Act, (29 Vic., cap. 28,) which section is as follows:—"Any person shall have the power to assign personal property now by law assignable, including chattels real, directly to himself and another person or other persons and corporation by the like means he might assign the same to another." See Rev. Stat. Ont. cap. 95 sec. 10.

Stocks and Shares.

Within the meaning of choses in action come stocks and shares. (*Humble* v. *Mitchell*, 11 A. & E., 205; *Scawen* v. *Blunt* 7 Ves. 300; *Rex* v. *Capper*, 5 Price, 217.) The transfer of shares in banks and other corporations is governed by the various general Acts of this Province, or of the Dominion relating thereto, or by the special Acts of incorporation. Their transfer is generally governed by certain necessary restrictions, such as not being transferable without the consent of the company unless all calls are paid, etc. When such restrictions are not made a condition precedent, it is not incumbent on the vendor of shares to obtain the consent of the directors. (*Cheale* v. *Kenward*, 3 Deg. and J., 27; see also *Wilkinson* v. *Lloyd*, 7, Q. B. 27.) And where the previous consent of the company is made essential to the validity of a transfer of shares, such consent may be presumed from the conduct and acts of the company, and they may be stopped from disputing it. (*In re Lane* 33 L. J., Ch. 84.) It is not ordinarily the duty of the vendor of shares to get the transfer registered. All he has to do is to execute the transfer to the purchaser. (*Taylor* v. *Stray*, 2 C. B. N. S., 195.) A Court of Equity will not ordinarily compel the directors to assent to the transfer, nor will specific per-

formance be decreed where they refuse to do so. (*Bermingham* v. *Sheridan*, 33 Beav., 660.) But a shareholder transferring shares is compelled to do all that is necessary to be done by him to obtain the consent of the directors. (*Poole* v. *Middleton*, 9 W. R., 758.)

Mechanic's Liens.

There is a provision in the Mechanic's Lien Act (Rev. Stat. Ont. Cap. 120), which enacts that "the right of a lien holder may be assigned by any instrument in writing," (sec. 16). This section was not in the original Mechanic's Lien Act of 1873; before it was passed, it was held that a mechanic having assigned his interest, and subsequently taken back a re-assignment of it in trust for his assignor, he was entitled to enforce the lien. (*Currier* v. *Frederick*, 22 Gr.243). A mechanic's lien being a right enforceable by legal or equitable process may properly come within the scope and meaning of the term chose in action. Other liens recognized at law are also choses in action, and the principles governing the transfer of choses in action will generally be found toapply to transfers of them.

Bail Bonds.

Bail bonds formerly derived their assignability from an old Statute 4 Anne cap. 16, sec. 20. By this Statute the sheriff or other officer, at the request and costs of the plaintiff, is required to assign to the plaintiff the bail bond or other security by endorsing the same and attesting it under his hand and seal in the presence of two or more credible witnesses; and if the bail bond be forfeited, the plaintiff, after such assignment, may bring an action thereon in his own name, and the Court, where action is brought, may by rule, give such relief to the plaintiff and defendant in the original action and to the bail as is agreeable to justice and reason, Under this Statute it has been held that

the seal of office, together with the signature of one of the sheriff's clerks, is sufficient to give validity to the assignment. (*Harris* v, *Ashley*, 1 Selwyn N.P., 586 u). The witnesses need not sign their names in the presence of the officer assigning. (*Philips* v. *Barber*, 1 Scott 322, 6 Car & P. 781.) By the plaintiff accepting an assignment of the bail bond, he could not call upon the sheriff to return the writ, (*Brooke* v. *Stowe*, 1 Wils. 223), but it is otherwise if the bond is void, (*Williams* v. *Jacques*, 1 Tidd's Pr. 307). After taking an assignment the plaintiff could not proceed in the original action while he retains his right to sue on the bond (Anon. 1 Chit. 394). By the Rev. Stat. Ont. cap 67, sec. 24, it is enacted in reference to bail bonds, that "upon breach of the condition of any such bond the party at whose suit the debtor is confined may require the sheriff to assign the same to him, and such assignment shall be made in writing under the seal of the sheriff, and attested by at least one witness, and the assignee of the sheriff, or the executors or administrators of such assignee may maintain an action in his or their own names upon such bond, which action, the sheriff shall have no power to release; but upon executing such assignment at such request, the sheriff shall be thenceforth discharged from all liability on account of the debtor or his safe custody." There cannot be an assignment of a bail bond until after forfeiture. (*Whittier* v. *Hands*, 18 U. C. R. 295; S. C. 19 U. C. R. 170; *Hicks* v. *Godfrey*, 15 U. C., C. P. 262).

Owing to the similarity of bail bonds and replevin bonds the following may be considered in this connection.

Replevin Bonds.

There are various Statutes relating to the assignment of replevin bonds, the English Act, 11 Geo. II. cap. 19, sec. 23, enacted certain provisions as to the manner in which replevin bonds were to be assigned, in cases arising out of

distress for rent. The sheriff under this Act was required to make the assignment in the presence of two or more credible witnesses, and certain formalties were prescribed very much in the same form as in the case of assignment of bail bonds under the Statute of Anne. As said by Wilson J. in *Hely, et al.*, v. *Cousins, et. al.*, (34 U. C. R. 71). "The decisions as to the assignment of bail bonds are commonly referred to as applicable to the assignment of replevin bonds." This Statute applied only to cases of replevin for distress for rent, and a bond taken under it, for other causes was not assignable (*Austen* v. *Howard*, 7 Taunt. 28.)

By Rev. Stat. Ont. cap. 53, sec. 11. (Replevin Act.) "Before the sheriff acts on the writ he shall take a bond in treble the value of the property to be replevied as stated in the writ; which bond shall be assignable to the defendant; and the bond and assignment thereof may be in the words or to the effect of form 2 in the Schedule to this Act, the condition being varied to correspond with the writ."

It will be observed that this section does not state anything as to the witnesses to the assignment as does the Statute 11, Geo. II., cap. 19. This latter Statute not being expressly repealed it was a question as to whether under our Statute, the assignment would be valid without following the English Act. It has been held that the English Act need not be followed and that one witness is sufficient under our Statute, (*Heley et. al.*, v. *Cousins*, *et. al.*, 34 U. C. R. 63; See also *Meyers* v. *Maybee*, 10 U. C. R. 200.)

A replevin bond becomes assignable when the plaintiff in the replevin action neglects to appear and prosecute according to the condition, (*Dias* v. *Freeman*, 5 T. R. 195) and the asignee could always have sued in his own name, (*Bacon* v. *Langton*, 9 U. C. C. P. 410.) It may be assigned to the avowant or to the person making cognizance

or both of them jointly, and consequently they may jointly sue upon it. (*Archer* v. *Dudley*, 1 Bos, & Pull. 581.) It may be assigned by a deputy sheriff or clerk in the sheriffs office, (see *Middleton* v. *Hughes*, 46 Camp. 36; *Heley, et al.*, v. *Cousins*, 34 U. C. R. 70.)

By taking an assignment of the replevin bond the defendant does not waive his remedy against the sheriff; therefore, if after proceeding against the sureties they are found to be insolvent, an action may be brought against the sheriff for taking insufficient pledges. (Gilbert on Replevin.)

Insolvency.

The several Insolvent Acts have provided that the debts due the insolvent became vested in the assignee with the effect of giving notice to the world of the insolvency. They also provided that the assignee might dispose of the debts after having acted with due diligence in endeavoring to collect them. The sale of the debts by the assignee did not create a warranty even that the debts were due. By the Act of 1869, (sec. 44), an order of the judge was required before the debts could be sold; but under the Act of 1875, (sec. 67), no such order was requisite. See sections of Act of 1875, relating to sale of debts by the assignee in the Appendix.

Bills of Exchange and Promissory Notes.

As is well known, bills of exchange and promissory notes are negotiable in a higher degree than other choses in action. It is not within the scope of this work to discuss bills and notes as negotiable instruments; there are several standard treatises on this subject alone. But as said in Chalmers on Bills of Exchange, (page 87) "A bill may be transferred by assignment or sale, subject to the

same conditions that would be requisite in the case of an ordinary chose in action." It is in reference to this method of transfer that these negotiable instruments are here treated. There are some bills and notes not negotiable, as when they are made payable to an individual without further words. These could, however, always have been assigned in equity like other choses in action. Even when a bill is negotiable, besides being capable of being transferred by endorsement, it can be transferred by separate writing. (*Richardson* v. *Richardson*, L. R. 3 Eq. 686.) Where it is transferred by delivery without endorsement, the transaction operates as an equitable assignment of the bill. (*Whistler* v. *Foster*, 14 C. B. N. S. 258). The transferee also acquires the right to compel endorsement. (*Harrop* v. *Fisher*, 10 C. B. N. S., 203 ; see also *Cunliffe* v. *Whitehead*, 3 Bing N. C. 830.)

But by the ordinary method of transferring a bill by endorsement, the endorsee has this advantage over a transferee by any other manner of transfer ; the bill is negotiable so that if transferred before maturity, the endorsee holds it free from any equities of which he has no notice: by the transfer, as choses in action generally are transferred, the transferee takes them subject to such equities. As a result of these two rules, it is clear that a subsequent title under the law merchant would override a prior title under a sale or assignment, according to the general law, *e.g.*, C., the holder of a bill payable to bearer, assigns by deed certain property, including the bill to D., C. no longer has any property in the bill, but he holds it, and if he transfers it by delivery to E., who takes it for value without notice, E's title overrides D's. (see Chalmers on Bills of Exchange, p. 87 : *Sheldon* v. *Parker*, 3 Hunter, N.Y., 498.) It is to be observed, however, that section 12 of Rev. Stat. Ont. cap. 116, expressly excepts bills and notes from the opera-

tion of the Act. See ante p. 45 as to bills, notes and cheques not being assignments of debts. (See also *Lamb* v. *Sutherland; Lamb* v. *Allen* 37 U. C. R 143; *Caldwell* v. *Merchants Bank* 26 U. C. C. P. 284.)

Covenants running with the Land.

In real property law, it is an established rule that the owner of an estate is entitled to the benefit of covenants which run with the land. An examination of this class of covenants, and of the assignment of them would entail in itself a lengthy chapter, and besides is more properly a subject to be treated of in a real property treatise. However, it has been decided in a late case, (*In re* Haisley, et. al., 44 U.C. R., 345), that these covenants can now,under the Statute relating to choses in action,be made assignable by contract, as they were before by the privity of estate. Thus it was held in this latter case, that the assignee of a leasehold term, and of all claims under covenants in the term, can as such assignee sue in his own name under Rev. Stat. Ont., cap. 116, sec. 7. As said by Hagarty, C.J., at page 351, "It is unnecessary to enter upon the rather tangled decisions that have occurred since *Spencer's case*, as to covenants running with the land, and the right of the assignee or lessee to sue therefor. The plaintiff was the assignee of the term by way of mortgage, and also of the lessee's equity of redemption therein, under the assignee in insolvency." And Cameron, J., says at page 354: "I think the plaintiff can maintain the action whether the covenant runs with the land or not, as he is assignee of the covenant as well as of the term, and the defendants are liable * * * * for breach of this covenant if it has been broken."

Mortgages.

The debt created by a mortgage whether of real estate or chattels is a chose in action; the real estate or chattel,

as the case may be, is the security for the debt. As said by Cameron, J., in a recent case (*Martin* v. *Bearman*, 45 U. C. R. 205), "The debt created by the chattel mortgage is the principal object of the mortgage, the goods being merely a security for the debt. A chattel mortgage is then in effect a chose in action, subject to the incidents thereof, and any matter open to enquiry between the original parties affecting their rights thereunder, may be questioned in any proceeding by or against theassignee." (See also *Matthews* v. *Wallwyn*, 4 Ves. 118). The assignee of a mortgage takes the same therefore, subject to equities or rights of set-off, subsisting between the mortgagor and mortgagee, being in the same position as the assignee of other choses in action, as explained in the two preceding chapters, (See Leith's Real Prop. Stats. p. 397; Taylor's Equity, sec. 823, *McPherson* v. *Dougan* 9 Grant 258; *McDonough* v. *Dougherty* 10 Grant 42; *Engerson* v. *Smith*, 9 Grant 16; *Galbraith* v. *Morrison*, 8 Grant 289). The mortgagor cannot, however, set up equities which accrue after such notice. (See ante Chapter III. and IV). Registration is not *per se* such notice, it appears, as said by Mr. Leith, (Real Prop. Stats. page 398) "It would seem that, under section 66 of the Registry Act, registry of the assignment would not be notice to the mortgagor, as that section only constitutes registry of instruments notice to those claiming *an interest subsequent* to such registry." This learned authority also advises that the mortgagor should if possible be made a party to any assignment of mortgage, or that he should at least recognize the existence of the mortgage debt. This would be a salutary course to adopt in the case of the assignment of any debt. An assignee, taking an assignment of a debt on the faith of a debtor's statement, would prevent the latter (on the gound of estoppel) from setting up any set-off or other equity, inconsistent with such statement. By the debtor joining in the assignment, he might also be made

liable on a direct promise, (see *Mitchell* v. *Goodall*, 44 U C. R. 398; S. C. 5. Tupper App. R. 164, *Coates* v. *Lloyd*, 3 U. C. R. 51); see also section on "Novations" in the preceding chapter.

Mr. Barron, in his recent valuable work on Bills of Sale and Chattel Mortgages, says, in reference to them, that the result of registration of an assignment of mortgage "is to supply the mortgagor with notice," and he cites a number of American decisions in support of this doctrine. (See Barron on Bills of Sale, page 208; *Reed* v. *Markle*, 10 page 409; *Walcott* v. *Sullivan*, 1 Edw. Ch. 399; *N. Y. Life Insurance Co.* v. *Smith*, 2 Barb. Ch. 82.) We submit, however, that this doctrine would hardly be sustained in our Courts. There is no statutory enactment in our Province making the assignment notice to the debtor, and no case either in reference to chattel mortgages or mortgages of real estate, can, we believe, be found establishing such a rule. The position, as above cited, taken by Mr. Leith (whose opinion is entitled to great weight), is consonant not only with the registry laws, but with principles of justice. It would be a rule of great hardship that would compel a mortgagor to go to the Registry Office, or to the office of the Clerk of the County Court, every time before paying a sum of money for either principal or interest on account of his mortgage debt.

As to how far equities will be allowed to be set up between the mortgagor and the assignee the important case of *Egleson* v. *Howe*, 3 Tupper, App. R. 566, is instructive. In this case a purchaser had taken a conveyance and given a mortgage for part of the purchase money. Afterwards under threat of proceedings being taken against the land by a prior mortgagee, he paid off the mortgage. This purchaser had taken a covenant from the vendor for the discharge of this prior mortgage. It was held revers-

ing the decision of Harrison, C. J., and overruling *Henderson* v. *Brown*, 18 Grant 79, that as against an assignee of the mortgage made by the purchaser with notice of these facts, the purchaser had no equity to set off or deduct from the assigned mortgage what he had paid on the prior mortgage subsequent to the assignment. In this case Moss, C. J. A., said at page 474. "The defendant's contention mainly rested upon two well settled principles. The first is that a purchaser is entitled to apply unpaid purchase money (even if secured) in the discharge of encumbrances which are in the vendor's covenants; and the other is, that an assignee of a mortgage takes it subject to equities subsisting between the mortgagor and mortgagee, ... at least in relation to the amount payable on the security. But when both of these propositions are conceded, they fall short of establishing the defence. It follows from the first that while the mortgage is still held by the mortgagee, equity should allow the mortgagor a right of retainer out of his unpaid purchase money to the amount he has been compelled to pay the prior encumbrancers, instead of being driven to an action of law upon the covenant. This would be permitted if upon no other ground upon that of preventing inconvenient circuity, as was explained by Esten, V. C., (*Tully* v. *Bradbury*, 8 Gr. 561.) But that is a right growing out of the fact of payment, and not, it appears to me, incidental to the original contract itself. To say that the purchaser is entitled to this right of retainer by virtue of the contract merely, is to suppose an agreement he may notwithstanding an assignment, pay off the encumbrance and deduct the amount from his mortgage debt. It seems to me that there is no sound ground for making such a supposition; but that, on the contrary, the circumstance that he takes an express covenant from the vendor for the discharge of this encumbrance indicates that he was to rely upon it for his indemnity."

In the renewal of an assigned chattel mortgage, the assignment must be filed at or before the time of the filing of the renewal. (See sec. 11 of Rev. Stat. Ont., cap. 119.)

As to the difference between a mortgage of chattles and an assignment of a power to deal with same, see *Patterson* v. *Kingsley* (25 Grant 425.) The assignment of such a power is the assignment of a chose in action. (*Ibid.*)

Inchoate Rights.

There are certain rights or choses in action, not arising out of contract such as patent rights, copyright, etc., which may be termed inchoate rights. A right of action arising out of tort is an inchoate right: it has been so called by Blackstone. Some of these inchoate choses in action are governed by particular rules, legislative and otherwise. The choses in action already treated of in this chapter are such as arise out of contract, including covenants running with the land, which more generally arise from privity of estate, in which case they cannot properly be termed choses in action; because choses in action (as will be seen by reference to the definition at page 1 *passim*) are rights to *personal* property. The rights spoken of in the remainder of this chapter are inchoate rights.

Copyright.

There is no statutory provision in Canada relating to the assignment of copyright of books. The Imperial Act, 5 and 6 Vic. Cap. 45, which is in force in this country (*Smiles* v. *Belford* 23 Grant 590; 1 Tupper App. R. 436) and which relates to the copyright of English works, has certain provisions (sec. 13) for the sale of copyright. The assignment of a copyright should be in writing (see *Leyland* v. *Stewart* L. R. 4 Ch. D. 419.)

A receipt in writing for the price of the copyright

operates as an effectual assignment, (*Kyle* v. *Jefferys*, 3 Macq. H. L. C. 611.) There cannot be a partial assignment of a copyright, (see *Jefferys* v. *Boosey*, 4 H.L. C. 815.) By the Statute 8 Anne. cap. 19, sec. 1, the assignment of a copyright must be attested by two witnesses (see *Davidson* v. *Bohn*, 6 C. B. 456; 12 Jur. 922; *Power* v. *Walker*, 3 M. & S. 7; *Thompson* v. *Symonds*, 5 T. R. 43.)

Trade Marks.

By the 14th section of the Trade Mark and Design Act of 1879 (42 Vic. Cap. 22 Canada) "Every Trade Mark registered in the office of the Minister of Agriculture shall be assignable in law, and on the assignment being produced and the fee hereinafter provided being paid, the Minister of Agriculture shall cause the name of the assignee with the date of the assignment and such other details as he may see fit to be entered on the margin of the Register of Trade Marks, on the folio where such Trade Mark is registered."

Designs.

By the 25th section of the same Act. "Every design shall be assignable in law either as to the whole interest or any undivided part thereof by an instrument in writing, which shall be recorded in the office of the Minister of Agriculture on payment of the fees hereinafter provided: and every proprietor of a design may grant and convey an exclusive right under any copyright to make use and vend and to grant to others the right to make use and vend such design within and throughout Canada or any part thereof, for the unexpired term thereof or any part thereof: which exclusive grant and conveyance shall be called a license, and shall be recorded in the same manner and within the same delay as assignments."

Patents.

By the 22nd section of the Dominion Patent Act of 1872, (35 Vic. Cap. 26.)

"Every patent for an invention, whensoever issued, shall be assignable in law either as to the whole interest or as to any part thereof, by any instrument in writing; but such assignment, and also every grant and conveyance of any exclusive right to make and use, and to grant to others the right to make and use, the invention patented, within and throughout Canada or any part thereof, shall be registered in the office of the Commissioner, in the manner from time to time adopted by the Commissioner of Patents for such registration; and every assignment affecting a patent for invention shall be deemed null and void against any subsequent assignee, unless such instrument is registered as hereinbefore prescribed, before the registering of the instrument under which such subsequent assignee may claim."

During the existence of a license of a patent, the licensee cannot dispute the validity of a patent obtained by him and afterwards assigned by him for value to another. (*Gillies* v. *Colton*, 22 Grant 123; *Whiting* v. *Tuttle*, 17 Grant 454; *Hague* v. *Maltby*, 3 T. R. 438; *Chambers* v. *Crichley*, 33 Beav. 474.)

The assignment of a right to manufacture does not necessarily mean an exclusive right to the patent (*The Fire Extinguisher Co.* v. *The Northwestern* (*Babcock*) *Fire Extinguisher Co.*, 20 Grant 625.

A contract for the sale of a patent right may be specifically enforced. (*Hall* v. *Condee*, 2 C. B. N. S. 41.)

CHAPTER VI.

TRANSFER OF CORPORATION DEBENTURES.

Statutory Provisions.
When debentures to be under seal.
Presentation.
Condition Precedent.
Liability of negotiator of debenture.
Assignee of debentures takes them free from equities.
Transfer of registered municipal debentures.
Coupons.
Liability of endorser of debentures.

Statutory Provisions.

By the 8th section of Rev. Stat. Ont., cap. 116, it is provided that, "the bonds or debentures of corporations made payable to bearer, or to any person named therein or bearer, may be transferred by delivery, and if payable to any person or order shall, (after general endorsation thereof, by such person), be transferable by delivery from the time of such endorsation, and by the second sub-section, "any such transfer shall vest the property of such bonds or debentures in the holder thereof, to enable him to maintain an action thereon in his own name."

Before entering upon the consideration of the transfer, it will be well as a preliminary step to discuss certain requisites of this class of choses in action.

When Debentures to be under seal.

The ordinary rule that contracts of corporations must be under seal applies to bonds and debentures. The only exception to this rule is in the case of municipal debentures,

in aid of a railway or for any bonus. Debentures of this class are valid without the corporate seal, or the observance of any form unless such as may be directed by the by-law of the corporation; they should be signed and countersigned, (see sec. 387, of Rev. Stat. Ont,, cap. 174). In the fourth edition of Harrison's Municipal Manual, the following observation on this provision is made: "Why such an exception should be either created or preserved, it is difficult to understand; but the law is so written. The effect of the section is as regards debentures in aid of any railway, or for any bonus, that they may be in such form as the by-law directs, and shall be valid notwithstanding the want of the corporate seal thereto."

Presentation.

When a bond or debenture is made payable at a particular bank it must be presented there before an action can be brought on it. (*McDonald, et al.* v. *Great Western Railway Company*, 21 U. C. R., 223). But although a debenture may be so made payable, yet, when there are no funds at the bank or other particular place ready to meet it, presentment need not be made. (*Fellowes* v. *Ottawa Gas Company*, 19 U. C., C. P. 174). As to presentation see also *Becher et al.* v. *the Corporation* of *Amherstburgh*, 23 U. C. C. P., 602).

Condition Precedent.

So, if there is a condition precedent to be observed before the payment of debentures, this condition needs to be fulfilled. Thus, where a corporation by its bond covenanted to pay a certain sum and interest "on the delivery at the Gore Bank" of the warrant or coupons annexed to the bond, it was held that such a delivery was necessary before the payment of the bond could be enforced. (*Osborne et al.* v. *the Preston and Berlin Railway Company*, 9 Grant 241).

Liability of negotiation of Debenture.

A person who negotiates the sale of a debenture does not bind himself that the corporation will pay the amount of the debenture. Therefore, when a township municipality issued debentures in aid of a road company, which debentures subsequently turned out to be illegal on account of the road company not having been properly constituted, a director of the road company, (in the absence of fraud on his part), was held not to be liable to refund to a purchaser of such debentures the amount paid by him to the director, the latter having negotiated the sale of the debentures. (*Sceally* v. *McCallum*, 9 Grant 434.)

Assignee of Debentures takes them free from Equities.

Contrary to the rule which governs choses in action generally, and which is explained at pp. 48 and 63 of this work, assignees of debentures do not take them subject to the equities which exist between the corporation and a prior holder, when these equities are unknown to the assignee at the time of the transfer to him.

In *McKenzie* v. *The Montreal and Ottawa R. W. Co.* (29 U. C. C. P. 333), when this question came up for adjudication, Wilson, C. J., cited the statutory enactment quoted at the beginning of this chapter, and, speaking of it, said: "that enactment, it appears to me, really concludes the whole question." And the brief judgment of Gwynne, J., was as follows: "The statute making these debentures transferable by delivery is conclusive upon the point in favor of the plaintiff." The debentures in this case were transferred in the first instance, to a contractor for the building of the company's road, who failed in his contract, by the terms of which, the debentures in such an event were forfeited to the company. The plaintiff afterwards became

the holder of the debentures. In his judgment, at page 338, Wilson, C. J., says:—"Every case upon this subject establishes the proposition that a company issuing debentures payable to bearer, does so with the intent that the person to whom they are delivered shall deliver them over as an ordinary transferable instrument, and that when the one to whom they were first delivered, does transfer them to another for value, the company cannot attach to these securities in the transferree's hands for value any equity whatever, which they might have set up against the payment of these instruments if they had continued in the possession of the original holder of them: that such a claim is inconsistent with the terms of such instruments, and with the purposes and objects for, and with which they were issued, and, if allowed, that it would be contrary to public policy, and to the universal custom of dealing with such instruments, and would render them utterly valueless, because no one would take them.

"In this case these debentures were no doubt paid out to the contractors for work done, or value given. The debentures themselves were not cash. The contractors could not carry on the work with these debentures in their hands: they must sell them, as it is called, for the price they would fetch in the market. The defendants knew the contractors would do so, and would have to do so, and that they could not advance with their contract without doing so. They knew also, that those who bought them would take them on the faith that they were, as bearers, getting a good title to them, and to the money they represented, and that the defendants would recognize the transferrees as the persons, and the only persons who were entitled to receive payment of the debentures which they held. The company knew also that the purchaser did not, and could not know of the private bargain between the contractor and the company creating a charge upon such instruments, and they knew,

too, that not one of these debentures could have been sold, if it had been declared on their face that they were subject in the transferree's hands to all equities between the company and the contractors, or if they had thought that there was any rule of law which gave to the company such a right. The company had, no doubt, received the value of these debentures before they issued them, and others, including the plaintiff, have given value to the contractors for them. It would be a direct and manifest fraud, if, after issuing such documents, and for such a purpose, and after receiving, as this company must have done, full value in work for them, they were now to set up an equity, which they had against the contractors, as against those who had given value for these debentures, which the company, it may be said, sent into the market with a declaration that they would pay any one who took them and gave value for them."

And, at page 340, he says :—"Beyond all question, the plaintiff must recover from the defendants on the merits, and on every principle of law and right, in some form or other, without regard to equities or supposed equities of the defendants against the contractors."

In this case which came up on demurrer, it is to be observed that the two pleas demurred to, one averred that the coupons to the debentures, (upon which coupons the plaintiff sued) were transferred to the plaintiff after such coupons became due. There was no reference to this particular plea in the judgment of the court, which was given on both pleas for the plaintiff. It would seem, then that the transferree of a debenture, after some of the coupons for interest became due, would stand in a better position to such overdue transferred coupons, than the transferree of a promissory note or bill of exchange who takes the note or bill after it is due. The transferree of an overdue

bill or note takes the same subject to such equities as are attached to the bill or note itself. (*Tinson* v. *Francis*, 1 Camp. 19; *Brown* v. *Davis*, 3 T. R. 80; 7 T. R. 429; see Byles on Bills, 6th ed., page 129.)

In the case of the *Imperial Land Company of Marseilles*, L. R. 11 Eq. 478, it was held that the debentures were promissory notes of the Company or if not, that they were negotiable instruments and amounted to contracts to pay any one who might happen to be the bearer; also, that the holders for value without notice of the equities between the original parties were entitled to prove for the amount due, free from all such equities.

Vice-Chancellor Malins, at page 490, said: "It would be contrary to every principle, and fatal to the existence of such instruments in this and all other companies, if, in the hands of every person taking them, they were subject to the equities between the company and the original holder, it would be a blow to the mercantile transactions of this country far beyond the value of any protection to be afforded to the members of this company, who, if they were unfortunate, were unfortunate in being betrayed by the persons to whom they committed their interests. Every principle of public policy calls upon us to repudiate the notion that such documents are to be treated like bonds or choses in action in which the equities between the parties can be entered into."

In re Natal Investment Company, L. R., 3 Ch. 355, it was held that there was nothing in the debentures there sued upon to take them out of the ordinary rule that the assignee of a chose in action takes it subject to all the equities between the original parties to the contract. But the current of authority is opposed to this case. (See *re General Estates Co.*, L. R., 3 Ch. 758; *re Blakely Ordnance*

Co., L. R. 3, Ch. 154; *Higgs* v. *Northern Assam Tea Co.*, L. R., 4 Ex., 387; *in re Northern Assam Tea Co.*, L. R. 10, Eq. 458; *Webb* v. *Commissioners of Herne Bay*, L. R. 5, Q. B. 642; *in re Hercules Insurance Co.*, L. R. 19, Eq. 302; *Watson* v. *Mid. Wales Railway Co.*, L. R. 2, C. P. 593; *Dickson* v. *Swansea, &c. Railway Co.*, L. R. 4, Q. B. 44.)

Even where a municipal debenture was *stolen* previous to its being regularly issued, it was held to be no bar to the claim of a *bona fide* purchaser for value without notice. (*Trust & Loan Company* v. *Hamilton*, 7, U. C. C. P. 98). At p. 100 of this last cited case, Draper, C. J., said: "I think the same principles which apply to bank notes, or promissory notes under precisely similar circumstances, should govern this case."

Transfer of registered Municipal Debentures.

By the 390th section of the Municipal Institutions Act, (Rev. Stat. Ont., cap. 174), it is enacted that any debentures to be issued by any Municipal Council may contain a provision in the following words: "This debenture or any interest therein, shall not *after* a certificate of ownership has been endorsed thereon by the Treasurer of this Municipal corporation be transferable except by entry by the Treasurer or his Deputy in the Debenture Registry Book of the said corporation at the Town (or Village) of ," *or to the like effect.*

The 391st section of the same act provides for the keeping of a Debenture Registry Book, and the 392nd section provides that debentures issued as aforesaid, shall only be transferred by entry in such book, "as transfers of such debenture are authorized by the then owner thereof or his lawful attorney." The effect of these sections is to take

such registered debentures out of the rule established in the above cases, and to make them non-negotiable except with the knowledge of the municipal corporation. In Harrison's Municipal Manual, (4th edition), at page 303, reference is made to this method of transfer in these words: "The provision is analagous to that against transfer of property in a ship except in a particular mode after certificate of ownership granted." (See *Sherwood* v. *Coleman*, 6 U. C. R., 614; *Orser* v. *Mounteny*, 9 U. C. R., 382; *Chisholm* v. *Potter*, 11 U. C. C. P., 165; *Wilson et al.* v. *Cameron*, 22 U. C. C. P., 198).

Coupons.

In the United States it has been held that the principle of negotiability has been applied to coupons even though detached from the debentures. (*Thomson* v. *Lee County*, 3 Wall. U. S, 327; *Johnson* v. *Stark, Co.*, 24 Ill. 75; *Murray* v. *Lardner*, 2 Wall. 110; *City* v. *Lamson*, 9 Wall. 477; *Knox County* v. *Aspinwall*, 21 How. 539; *Railroad Co.*, v. *Otoe Co.*, 1 Dillon, C. C. R., 338).

Liability of endorser of Debenture.

It has also been held in the United States, in analogy to the rule governing the endorsement of promissory notes, and bills of exchange, that the endorser of a debenture coupon is liable for the amount thereof. (*Bull* v. *Sims*, 23 N. Y., 570. See also *Campbell* v. *Polk Co.*, 3 *Iowa*, 467; *Fairchild* v. *Ogdensburg*, R. R. C., 15 N. Y., 337; *Hodges* v. *Shuler*, 22 N. Y., 114; *Keller* v. *Hicks*, 22 Cal. 457).

These questions do not seem to have arisen either in this province or in England, and, although in other respects the courts have gone a great length affirming the negotiability of debentures, it is difficult to say whether the doctrines laid down in the above United States decisions would be recognized.

CHAPTER VII.

TRANSFER OF BILLS OF LADING.

Formerly property only in subject matter of bill of lading, and not contract transferred by assignment.
Former rule amended by statute.
Requisites of negotiability.
Indorsee of bills of lading, takes same free from equities.
Bill of lading represcnting goods to be shipped on board which, in fact, are not shipped—Right of indorsee.
Cases when the bill of lading is signed by an agent.
Consideration for bill of lading.
Re-indorsement of bill of lading to consignor.
Shipping receipts.
Warehouse receipts.

Formerly Property only in subject matter of bills of lading and not contract transferred by assignment.

Bills of lading were always at law negotiable in this sense:—The endorsement of them transferred the property in the goods, but such endorsement had no further effect, and it was held that the right of action *ex contractu* evidenced by a bill of lading was not transferable, (*Thompson* v. *Dominy*, 14 M. &. W. 303; *Howard* v. *Shepherd*, 9 C. B. 297; *Tindal* v. *Taylor*, 4 E. & B. 219).

Former rule amended by Statute.

This rule has been changed by statute. Following the English Act 18 and 19 Vic. cap. III., our Ontario statute Rev. Stat. cap. 116, sec. 5, enacts as follows:—"Whereas by the custom of merchants, a bill of lading of goods being transferable by endorsement, the property in the goods may

thereby pass to the endorsee, but nevertheless, all rights in respect of the contract contained in the bill of lading remain in the original shipper or owner, and it is expedient that such rights should pass with the property; and whereas it frequently happens that the goods in respect of which bills of lading purport to be signed, have not been laden on board, and it is proper that such bills of lading in the hands of a *bona fide* holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid;

"Therefore it is enacted as follows:

"1. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason of such consignment or endorsement, shall have transferred to, and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made to himself: 33 V., C. 19, s. 1.

"2. Nothing in this section contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee, by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement: 33 V., C. 19, s. 2."

The law as it refers to the property in the goods, is not changed or affected by these sub-sections; the right of action being made the subject of transfer, is superadded to the property being transferred. The distinction formerly made between the transfer of the property and the transfer of the rights arising out of the contract, illustrates very

clearly the generally recognized difference which prevailed at law between the assignment of an ordinary chattel, and the assignment of a chose in action. We will now discuss the assignment of bills of lading generally, and since the transfers respectively of both ingredients above mentioned stand now upon the same footing, what is said of the one will naturally apply to the other.

Requisites of Negotiability.

A bill of lading which does not contain such words as "or order," or the words "or assigns," or other words to the like effect, is not a negotiable instrument. (*Henderson* v. *Comptoir, d'Escompte de Paris*, L. R., 5 P. C. App., 253). But see elsewhere in this Manual, in which a bill of exchange of this non-negotiable character and of similiar description is shown to be assignable as an ordinary chose in action.

Indorsee of Bill of Lading takes same free from Equities.

Like other negotiable instruments, a bill of lading on being transferred is in the hands of the holder, free from the equities, which exist between prior parties when such equities are unknown to the holder. Thus the indorsee in the absence of notice of fraud, or insolvency or want of title on the part of the indorser, becomes the absolute owner of the goods mentioned in a bill of lading, so as to defeat the right of the unpaid vendor to stop them *in transitu*. (*The Argentina*, L. R., Adm. & Eccl, 370; the *Marie Joseph*, L. R., 1 P. C., 219; *Roger* v. *Comptoir, d' Escompte de Paris*, 40 L. J. P. C. 1; *Gilbert* v. *Gugnon*, L. R., 8 Ch. 16; *Coventry* v. *Gladstone*, L. R., 4 Eq. 493). Even though the consideration is past, and not given at the time, the bill of lading was handed by the lawful holder to the transferree, still the latter holding the bill *bona fide* and for value, holds it so as to defeat the right of the unpaid vendor to

stop *in transitu.* (*Leask* v. *Scott Brothers*, L. R., 2 Q. B. Div. 376). In accordance with the principle that the *bona fide* transferree of a bill of lading holds the same unimpaired by any equities between prior parties, it has been held that when the bill has been given on a secret trust, an indorsee for valuable consideration who was not aware of such trust held the bill free from the same. (*Chartered Bank of India* v. *Henderson*, L. R., 5 P. C., 501).

Bill of lading representing goods to be shipped on board which, in fact, are not so shipped—Right of indorsee.

By the third sub-section of section five of Rev. Stat. Ont., cap. 116: "Every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel or train shall be conclusive evidence of such shipment as against the master or other persons signing the same notwithstanding, that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading has actual notice at the time of receiving the same that the goods had not in fact been laden on board, or unless such bill of lading has a stipulation to the contrary; but the master or other person so signing, may exonerate himself in respect to such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or of some person under whom the holder claims." See also the preamble to this section cited elsewhere in this work. This section is similar to the Imperial Act 18 and 19 Vic., c. 111, only that in the Imperial Act a vessel is mentioned, in our Act the words are "train or vessel."

Cases where the bill of lading is signed by an agent.

The question as to the right of an endorsee receiving a bill of lading representing goods to have been shipped on

board a train or vessel, which goods are in fact not so shipped, and where such bill of lading is signed by an agent of the common carriers, is a question of very wide importance. It has given rise to a great deal of discussion in this province, in England and the United States, and still remains very much unsettled. In the very recent cases of *Erb et al.* v. *The Great Western Railway Company* 42 U. C. R. 90 and *Oliver* v. *Great Western Railway Co.* 28 U. C. C. P., 143, and in the former case of *Erb et al.* v. *The Great Western Railway Company* in appeal (3 Tupper's App. R. 446), the question came up with the following results: In the case in the Court of Queen's Bench, Wilson and Morrison, J. J., were in favor of the defendants, Harrison, C. J., dissenting, and in the case in the Court of Common Pleas, Gwynne and Galt, J. J., held also in favor of defendants, Hagarty, C. J., dissenting. Both cases were brought to appeal, it being the understanding that the decision in *Erb's* case would be binding in the other suit. In the Court of Appeal, Patterson, J. A., and Blake, V. C., held in favor of the plaintiff, while Moss, C. J. A., and Burton, J. A., were in favor of the defendant, and the court being thus equally divided, the appeal was dismissed The cases were then carried to the Supreme Court, but although the appeal was entered, it was never argued. The facts of these cases were briefly as follows:—One, Carruthers, was station agent for the Great Western Railway Company, at Chatham, Ont.; he also carried on a partnership produce business with another party, he being the chief partner, the name of the firm being "T. Brown & Co." As station agent, he issued the bills of lading to T. Brown & Co., when in fact no such goods as mentioned in the bills had been received by the company from the firm. Carruthers then as a partner in the firm of T. Brown & Co., drew bills of exchange on Oliver Gibbs & Co., Montreal, and on Erb & Bowman, St. John, N. B., and on the security of the bills

of lading attached to such bills of exchange, discounted the latter in a Bank in Chatham. The drawers respectively accepted the bills of exchange and paid them, but they never received anything on account of the bills of lading: they then brought these actions against the company.

The chief grounds upon which the majority of the Courts of Queen's Bench and Common Pleas, and two of the judges in the court of appeal, joined in opinion against the plaintiffs' right to recover in these cases may be stated briefly to be that the agent, Carruthers, did not act within the scope of his authority, which was to issue bills of lading and shipping receipts, *only for such goods as were actually delivered to the defendants, and that he had no authority to issue bills of lading or shipping receipts for goods which were not actually shipped on board. Per contra* as was expressed by Blake, V. C., in the case in appeal:—"I think that here the defendants gave their agent, Carruthers, a duty to perform; they clothed him with the requisite power to perform it, they placed him in a position which enabled him to transact it, and they are responsible for the mode in which he executes such duty. It is immaterial to my mind whether he, through inadvertance, gave a bill of lading for more goods than were shipped, or whether he innocently gave a bill of lading for goods not shipped, and which were never shipped, or whether as here, he fraudulently gave a bill of lading for goods which never existed; the company must in all such cases, make good to the innocent holder for value, the extent of the loss occasioned by the misrepresentation. The weight of authority seems to sustain this position. I can find no case which overturns it. I think the verdict should be entered for the plaintiffs, and the appeal allowed with costs. If we hold otherwise, we shall virtually be saying that the bill of lading for the chief object it is given, is valueless, and that one advancing money

on a cargo must, notwithstanding his bill of lading, inform himself through some other agent, or otherwise whether the goods certified as shipped, have in fact been shipped."

Hagarty, C. J., referring to another weighty consideration in the case of *Oliver* v. *The Great Western Railway Company*, said, at page 179: "Nothing is better and more universally known to all business men in Canada, than the practice of the vendor drawing on the vendee for the price of goods, obtaining cash for the endorsement of the shipping receipt of a railway company, sending on the produce as the property of the discounters, and obtaining the acceptance and payment on handing over the shipping receipt. The practice is so universal that we may well assume that all parties act and contract in reference to it.

"The railway companies have engrossed the bulk of our carrying and forwarding trade, and they specially invite the attention of the commercial world to their facilities, and point out how produce can be sent and bills of lading granted; and we cannot refuse to consider that they do all this with the fullest knowledge of the use almost always made of the documents signed by their authorized agents.

"I cannot think that the law imposes on the holder of a receipt by the authorized agent of the railway the duty of enquiring or the risk of accepting without enquiry whether the goods there stated to be received for transport have been in fact so received."

The question thus remains greatly unsettled. It apparently brings into conflict two great principles, viz:— The negotiability of bills of lading, and the non-liability of employees for the acts of servants performed by the latter outside the scope of their authority. To hold as did the majority of the judges in the above cases, is to put to great

risk the transferrees of bills of lading and to deal a heavy blow at their negotiability. On the other hand, great peril lies upon employees, if their responsibility is made so wide as to cover such frauds as those performed by Carruthers in the above cases. To make a rule either way will cause danger, but in regard to the railway or other company, they stand in a position in which they can protect themselves by obtaining security to cover the defaults of their employees, while an indorsee of a bill of lading does not stand in such a favorable position. Then, as observed by Hagarty, C. J., in reference to the mode of discounting drafts on the strength of bills of lading: "The practice is so universal that we may well assume that all parties act and contract in reference to it." Apart from any strict rule, if the question were to be decided as far as it affects the public welfare, it would seem to be that the safer and better principle to adopt, is one in favor of the negotiability of bills of lading.

A similar question came up in *McLean et al.* v. *Buffalo and Lake Huron R. W. Co.*, (23 U. C. R., 448 and 24 U. C. R. 271). One, Bunnell, having stored flour with the defendants, took a kind of warehouse receipt. This was afterwards exchanged for a shipping receipt, that the goods were to be sent to Port Colborne ready to be delivered to the party entitled to the same. Bunnell drew on the plaintiffs and discounted the draft at the Bank, giving then the receipts. The plaintiffs accepted and paid the drafts, getting the receipts from the bank. It appears some two hundred barrels of flour were missing out of a large quantity mentioned in the receipts. The court decided in plaintiff's favor. A distinction between this case and the cases of *Erb & Oliver* v. *Great Western Railway Company*, above cited, is this: In the former the agent made a mistake; in the latter cases his act was fraudulent. But the broad

ground upon which the latter cases were decided, was that the agent exceeded the scope of his authority in signing receipts for goods which were not shipped, his authority being limited to sign receipts for goods only which were shipped. Under this principle, as laid down by the majority of the judges of the Courts of Queen's Bench and Common Pleas, the decision in *McLean et al.* v. *Buffalo and Lake Huron Co.*, seems to be overruled.

The reader is particularly referred to the very lengthy and able judgments in the above cases, and to the copious citations of English and American cases bearing upon the subject, which will be found in the cases of *Erb* v. *the Great Western Railway Co.*, and *Oliver* v. *the Great Western Railway Co.* The cases which mostly agree in principle with the majority of the judges in the latter cases are *Grant* v. *Norway*, 10 C. B. 665; *Schooner Freeman* v. *Buckingham*, 18 How. (U. S., Sup. Ct.) 182; *Berkeley* v. *Watling*, 7 A. & E. 29, *Hubbersty* v. *Ward*, L. R., 8 Ex. 330; *Jessel* v. *Bath*, L. R., 2 Ex. 267; *Colman* v. *Riches*, 16 C. B. 104; *Baltimore and Ohio Railway Co.* v. *Wilkins*, 22 Am. 26. The cases opposed are *McLean* v. *Buffalo and Lake Huron Railway Co.*, 23 U. C. R., 448 and 24 U. C. R., 271; *Swire* v. *Francis*, L. R. 3 App. 106; *Armour* v. *Michigan*, 22 Am. 603; *Griswold* v. *Haven* 25 N. Y., 595; *Mackay* v. *the Commercial Bank of New Brunswick*, L. R., 5 C. P., 394; *Howard* v. *Tucker*, 1 B & Ad. 712.

The English cases which agree with the decision in *Erb's* case are decided upon the same ground. As expressed by Jervis, C. J., in *Grant* v. *Norway*, (10 C. B., 665): "The very nature of a bill of lading, shews that it ought not to be signed until goods are on board; for it begins by describing them as shipped. It was not contended that such course is usual. So here the general usage gives notice to all people that the authority of the captain to give bills of lading, is

limited to such goods as have been put on board; and a party taking a bill of lading either originally or by endorsement, for goods which have never been put on board, is bound to shew some particular authority given to the master to sign it."

Consideration for Bill of Lading.

Where a bill of lading of certain goods is sent to a consignee together with a bill of exchange drawn on him for the price of the same, he must accept the bill of exchange, otherwise he cannot retain the bill of lading. If he does retain it, without accepting the bill of exchange, he acquires no right to the bill of lading thereby. (*Shepherd* v. *Harrison*, L. R., 4 Q. B. 196; *Ibid*, 5 H. L. 116).

Re-indorsement of Bill of Lading to Consignor.

By the re-indorsement of a bill of lading to the consignor, he is remitted to all his rights as against the shipowners on the original contract; he may sue for any breach which occurs either before or after the re-indorsement. (*Short* v. *Simpson*, L. R. 1 C. P. 248). See also chap XI. as to re-assignment of a chose in action.

Shipping Receipts.

Shipping receipts come under the same category as bills of lading. In *Erb's* and *Oliver's* cases above cited, they were considered the same as bills of lading by the whole Court. They were objected to on the arguments in appeal, as not being bills of lading, but in all the judgments rendered there seemed to be no distinction made as between shipping receipts and bills of lading. With reference to the objection taken on behalf of the defendants, it is thus noticed by Patterson, J. A., at p. 458 of *Erb* v. *Great Western Railway Co.*, (3 Tupper App. R.) "One answer

made by Mr. Cameron was, that these documents were not bills of lading, because they do not name the cars which contained the grain—a bill of lading proper, containing the name of the vessel on which the goods are laden. I think these are bills of lading, not only because the defendants treat them as such, but because I do not consider the car the equivalent of the vessel. I think the railway must be taken to represent the vessel—including of course in the railway the cars and engines used in working it. It is the instrument by which the defendants convey freight —as the vessel is that of the carrier by water."

Warehouse Receipts.

Warehouse receipts being negotiable only in the restricted sense in which bills of lading were formerly negotiable, (in regard to property in goods only), they do not come within the scope of this treatise.

CHAPTER VIII.

RIGHT OF SURETY TO SECURITIES ON PAYMENT OF DEBT.

Contribution between Co-sureties.
Right of surety to assignment of securities.
Rules of Equity.
Statutory Provisions.
Creditor to give full benefit of securities to surety.
Surety must pay debt before he is entitled to assignment of securities.
Proportion for which surety can enforce judgment or securities.
Assignment of judgment must be made before surety can enforce same.
Sureties for Corporations.
Jurisdiction and method of enforcing assignment.
Statute of Limitations.

Contribution between the Co-Sureties.

It has long been recognized, both at law and in equity, that when sureties are jointly bound for a principal, and one of them is compelled to pay, and does pay the amount, or perform whatever obligation for which they mutually become responsible, the surety so paying, or otherwise performing the obligation, is entitled to contribution from his co-sureties. There are some differences in the principles of equity and of law in this regard, courts of equity being more favourable than courts of law towards the surety.

Right of Surety to Assignment of Securities.

It is not our object in this chapter to enlarge upon the various rules of contribution between sureties, but to enquire into the subsidiary rule long recognized in equity, and now made a statutory rule at law, that a surety is en-

titled (on payment of the debt for which he became surety) to the assignment of securities held by the creditor in respect of such debt. This statutory rule applies equally to securities against co-sureties and principal debtors. Before the statute the surety was in equity entitled only to the securities held by the creditor from the other sureties, and was not entitled to an assignment of the debt itself, or of the instrument by which the debt was evidenced. (See Story's Equity, sec. 499 b.)

Rules of Equity.

The equitable doctrines are thus expressed in Story's Equity, (sec. 499), "Sureties are also entitled to the benefit of all securities which have been taken by any one of them to indemnify himself. Courts of Equity hold them entitled, upon payment of the debt due by their principal to the creditor, to have the full benefit of all the collateral securities held by the creditor. Thus, for example, if, at the time when the bond of the principal and surety is given, a mortgage also is made by the principal to the creditor as an additional security for the debt; there, if the surety pays the debt, he will be entitled to have an assignment of that mortgage, and to stand in the place of the mortgagee. And the same rule applies to all securities taken by the creditor subsequent to the surety becoming bound. And as the mortgagor cannot get back his estate again without a re-conveyance, that assignment and security will remain a valid and effectual security in favour of the surety, notwithstanding the bond is paid. This indeed is an illustration of a broader doctrine established by Courts of Equity, which is, that a creditor shall not by his own election, of the fund out of which he will receive payment, prejudice the rights which other persons are entitled to; but they shall either be substituted to his rights, or they may compel him to seek satisfaction out of the fund

to which they cannot resort. It is often exemplified in cases where a party having two funds to resort to for payment of his debt, elects to proceed against one, and thereby disappoints another party who can resort to that fund only. In such a case a disappointed party is substituted in the place of the electing creditor, or the latter is compelled to resort in the first instance to that fund which will not interfere with the rights of the other." (See also *Craythorne* v. *Swinburne*, 14 Ves. 160; *Wright* v. *Morley*, 11 Ves. 12, 22; *Swain* v. *Wall*, 1 Ch. R. 149; *Hodgson* v. *Shaw*, 3 Myl. & K. 183; *Reed* v. *Norris*, 2 Myl. & Cr. 361; *Copis* v. *Mid. dleton*, 1 T. & Russ. 224; *Boultby* v. *Stubbs*, 16 Ves. 20; *Wright* v. *Morley*, 11 Ves. 12; *Rumbold* v. *Rumbold*, 3 Ves. 63; *Mayhew* v. *Cricket*, 2 Sw. 191; *Sagittary* v. *Hyde*, 1 Vern 455; *Mills* v. *Eden*, 10 Mod. R. 88; *Aldrich* v. *Cooper*, 8 Ves. 388; *Trimmer* v. *Bayne*, 9 Ves. 209; *Menzies* v. *Kennedy*, 23 Grant 360. But see *Joseph* v. *Heaton*, 5 Grant 636, and *Topping* v. *Joseph*, 1 Grant, E. & A. 292); while the case of *Rigney* v. *Vanzandt*, 5 Grant, 494, is a clear application of the principle.

Statutory provisions.

The following are the second, third, and fourth sections of Rev. Stat. Ont. cap. 116, referring to the right of the surety. They are copied from the Imperial Act (19 & 20 Vic., c. 97, s. 5.)

"2. Every person who being surety for the debt or duty of another, or being liable with another for any debt or duty, pays such debt or performs such duty, shall be entitled to have assigned to him, or a trustee for him, every judgment, specialty, or other security which is held by the creditor in respect of such debt or duty, whether such judgment, specialty or other security be or be not deemed

at law to have been satisfied by the payment of the debt, or the performance of the duty. 26 V., c. 45, s. 2.

"3. Such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be and on proper indemnity, to use the name of the creditor in any action or other proceeding at Law or in Equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who has so paid such debt, or performed such duty; and such payment or performance so made by such surety shall not be pleadable in bar of any action or other proceeding by him. 26 V., c. 45, s. 3.

"4. No co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor by the means aforesaid more than the just proportion to which as between those parties themselves, such last mentioned person is justly liable. 26 V., c. 45, s. 4."

In cases where the creditor had recovered judgment against the debtor, it was formerly held as a reason against the surety taking an assignment of the judgment debt itself, that by payment of the debt the title derived under the assignment had become extinguished; and that where the surety would afterwards sue for the debt, the principal might plead such payment in bar of the action. (*Woffington* v. *Sparks*, 2 Ves. 569; *Gammon* v. *Stone*, Ves. 339; *Copis* v. *Middleton*, 1 T. & Russ. 224). But now, by virtue of the above sections, the surety may take such an assignment, and the payment by him to the creditor cannot be pleaded against him.

The necessity of suing in the name of the creditor referred to in the third section will not now likely arise, as the

assignee of a chose in action may now by sec. 7, sue thereon in his own name.

Retrospective effect of these sections.

These sections apply to a contract entered into before the passing of the Act, provided a breach has taken place and payment has been made by the surety after the passing of the Act. (*De Wolff.* v. *Lindsell*, L. R., 5 Eq. 209 ; *Lockhart* v. *Reilly*, 1 De. & G. J., 464).

Creditor to give full benefit of securities to Surety.

The creditor is bound to give to the surety the benefit of every security which he holds at the time of the contract, and is not, in equity, allowed in any way to vary the position of the surety with reference to these securities, (*Pearl* v. *Deacon*, 24 Beav. 186) ; and every security which the creditor has the benefit of at the time of the contract of suretyship is entered into, is supposed to be made known to the surety at the time of his entering into the obligation ; and if, through any neglect on the part of the creditor, he is deprived of the benefit of them, or is put into a different position from that which he was in at the time the contract was entered into, he is discharged, (*Newton* v. *Charlton*, 10 Ha. 650 ; *Strange* v. *Fooks*, 4 Giff. 412 ; *Whiting* v. *Burke*, L. R., 10 Eq. 539 ; *Wulff* v. *Jay*, L. R., 7 Q. B. 756.)

Surety must pay debt before being entitled to assignment of securities.

The surety is not entitled to compel an assignment of the securities unless he has paid the debt in full. (*Ewart* v. *Latta*, 4 Macq., H. L. 983 ; see also *McLean* v. *Jones*, 2. L. J., N. S. 206). However, as between a surety and the principal for whom he has become responsible the surety can in equity compel the principal to pay the debt or dis-

charge the obligation for which the surety has become responsible, without the latter first doing so. *Teeter* v. *St. John*, 10 Gr. 85 ; *Paton* v. *Wilkes*, 8 Gr., 252.)

Proportion for which surety can enforce judgment or securities.

By the fourth section, above quoted, it will be seen that a co-surety, co-contractor, or co-debtor cannot recover "more than the just proportion" to which he is entitled as between himself and his co-surety, co-contractor, or co-debtor. Thus, where a judgment was recovered against two defendants, G. and S., two partners, the defendant G. paid the judgment, and then issued execution against S. on the judgment for half the amount. It appears, however, that the partnership affairs were unsettled, and that an award had been made in favor of S., the validity of which was disputed by G. It was held that the execution was improperly issued, and it was set aside. Galt, J., in delivering judgment, said: "It appears to me that the provisions of this Statute were not intended to embrace the case of partners, so as to enable one partner, without reference to the state of the partnership accounts, to enforce payment by his partner of one half of a partnership debt paid by him." *Scripture* v. *Gordon et al.*, 7 P. R., 164 ; see also *Potts* v. *Leask et al.*, 36 U. C. R., 476.)

A surety for part of a debt is not entitled to the benefit of a security given by the debtor to the creditor at a different time for another part of the debt. (*Wade* v. *Cooper*, 2 Sim. 155).

Assignment of judgment must be made before surety can enforce same.

A surety cannot, without a plaintiff's consent, enforce a judgment against a co-defendant of the surety; he must

obtain an assignment of the judgment, (*Potts* v. *Leask et al.*, 36 U. C. R., 476). But the absence of a formal assignment will not prevent a surety from enforcing a remedy (such as a set-off,) which he would have if an assignment had been executed. (*Chichester* v. *Gordon et al.*, 4 P. R., 92).

Sureties for Corporations.

Where a municipal corporation having a debt to pay which it is to their advantage to discharge immediately, raised money upon an accomodation note of an individual, and applied the money in payment of the debt, promising, by a resolution of the council, to protect the note, or to repay, relief was given against the corporation upon a breach of the promise. And if the corporation could have been compelled to pay the debt, the person so giving his note will be entitled to stand in the place of the corporation creditor. (*Burnham* v. *Peterboro*, 8 Grant, 366.) As to cosureties to the crown, see *Regina* v. *Land*, 3 U. C. R., 277.)

Jurisdiction and method of enforcing assignment.

A court of common law, under its summary jurisdiction by motion, has no power to enforce an assignment of security, in favor of a surety or a co-defendant, (*Brown* v. *Gossage*, 15 U. C. C. P., 20.) The proper method is by filing a bill in chancery, to which the debtor is a necessary party, (*Cockburn* v. *Gillespie*, 11 Grant, 465; see also *McQuesten* v. *Winter*, 10 Grant 464). A court of equity will not grant the assignment of a security by the creditor to the surety, unless the court is of opinion that the assignment can be made available by the surety. (*Dowbiggen* v. *Bourne*, 2 Y. & C., 462). Under the rule in equity as it existed before the Statute, as explained in the beginning

of this chapter, an assignment of a judgment by the creditor against the principal debtor, could not be made available, but now it is so, and it is difficult to see in what other way an assignment security could not be available to the surety.

Statute of Limitations.

The assignment of a judgment to a trustee for one of the defendants who had paid the debt, such defendant being the surety for another defendant, was valid, notwithstanding it was made six years after such payment, and when the surety's direct cause of action against the principal debtor had been barred by the Statute of Limitations. (*Smith* v. *Burn et al.*, 33 U. C. C. P. 630.

CHAPTER IX.

MAINTENANCE AND CHAMPERTY.

Maintenance in assignments of Choses in Actions.
Definition.
Illustrations.
Transfer of mere right of suit void.
But such transfer valid when incidental to another right.
Contracts made in foreign country.
Nominal litigant under direction of others.
Maintenance a ground for action on the case.
Rules of maintenance relating to Attorneys.
Exceptions to law of maintenance.
Relationship.
Party having an interest in the subject matter.
Other cases where maintenance does not apply.
On what grounds contracts of maintenance are set aside.

Maintenance in assignment of Choses in Action.

It is chiefly in connection with the assignment of choses in action, that the courts are called upon to deal with maintenance and champerty. Indeed, as will be seen by reference to the words of Lord Coke, quoted in the introductory chapter of this manual, it was on the ground that *any* assignment of a chose in action was in itself considered maintenance, that such assignments were looked upon by the law in ancient times, with disfavor.

Definition.

Maintenance, as understood with reference to a court of justice, is defined by a standard authority, to be, where one officiously intermeddles in a suit depending in any such court which in no way belongs to him by assisting either party with money or otherwise in the prosecution or de-

fence of any such suit. When this is done without any agreement to have part of the thing in suit, this generally goes under the common name of Maintenance, as distinguished from Champerty, which is a species of maintenance. Champerty is where one intermeddles in a suit, to have part of the thing in suit. (See Hawk P. C. tit. Maintenance, c. 27, ss. 2 & 3. See also Tapp., pp. 19, 20).

Illustrations.

Where navy agents had, during the pendency of a suit in the Admiralty Court, as to the claim of certain prize-money, entered into an agreement with the representatives of one of the captors to indemnify them from the costs of any proceedings touching such prize-money, if such prize-money should not be received; one fifth of all sums to be recovered, being assigned by such representatives to the said agents; the Master of the Rolls (Sir W. Grant) expressed his clear opinion, that the agreement was void from the beginning, as amounting to that species of maintenance which is called champerty; viz., the unlawful maintenance of a suit in consideration of a bargain for part of the thing, or some profit out of it. (*Stevens* v. *Bagwell*, 15 Ves. 139).

So, where a bill was filed praying for a discovery whether the plaintiffs were not employed by one of the defendants (the Duke of Portland,) as solicitors to present and prosecute a petition on behalf of the other defendant, Mr. Tierney, complaining of the return of a member of parliament, and praying that Mr. Tierney might be declared duly elected, Lord Loughborough, C., allowed a demurrer to the bill, on the ground that the discovery sought was of circumstances, which, if admitted, would clearly subject the defendants to the penalties against maintenance, which he observed were applicable to maintenance of any kind of

suits, whether at common law or otherwise. (*Wallis* v. *the Duke of Portland*, 3 Ves., 494.)

Again, where an agreement was made to give half of the subject matter to be obtained in the contestation of a will, it was held that such an agreement was champerty. (*Hutley* v. *Hutley*, L. R., 8 Q. B., 112.)

In a case in our own reports the plaintiff purchased land from a party not in possession, and for less than one sixth its value; the vendor, too, did not pretend to be the owner of this land. The defendant, who was in possession claimed to be the owner through the same party from whom the plaintiff bought for the trifling sum above mentioned; but, by a mutual mistake on the part of the defendant and this vendor, a misdescription of the land was made and the parcel of land in question which was intended to be included, was omitted. The plaintiff knowing that defendant was in possession, proposed to the vendor for the purchase of his right to this piece of land, and also agreed to indemnify him against any costs of suit in the matter. It was held that this contract savored of champerty and maintenance, and was not that honest *bona fide* purchase which the Registry law was intended to protect. (*Wigle* v. *Setterington*, 19 Grant, 512.) For other instances of champerty and maintenance both in regard to choses in action and other matters, see the following cases, (*Skapholme* v. *Hart*, Rep. t., Finch, 447; *Powel* v. *Knowles*, 2 Atk., 224; *Strachan* v. *Brander*, 1 Eden., 303; *Wood* v. *Downes*, 18 Ves., 120; *Harington* v. *Long*, 2 M. & K., 590; *Jones* v. *Thomas*, 2 Y. & C., 498; *Pierson* v. *Hughes*, Freem. 70, 81; *Sprye* v. *Porter*, 7 E. & B., 58; *Stanley* v. *Jones*, 5 M. & P., 207, 7 Bing, 369; *Reynell* v. *Sprye*, 21 L. J. Ch., 633; *Earle* v. *Hopwood*, 9 C. B., N. S., 566; *Muchall* v. *Banks*, 10 Grant, 25.)

Transfer of mere right of suit void.

A bare right to file a bill in equity to set aside a transaction which according to the doctrines of equity is liable to be rescinded on the ground of fraud, cannot be assigned. (*Prosser* v. *Edmonds*, 1 Y. & C. Ex. 481.) This is, as appears from the cases, a well settled doctrine, as far as relates to assignments *inter vivos*, but such a right may be devised both under the Wills Act, (Rev. Stat. Ont., cap. 106, sec. 10,) and by virtue of decisions prior to the passing of the Act, indeed the Act in this, as in many other respects, is only declaratory of the law. (See *Gresley* v. *Mousley*, 4 DeG. & J., 78; *Stump* v. *Gaby*, 2 DeG. & J., 623; *Uppington* v. *Cullen*, 2 D. & W., 184.

But such transfer valid when incidental to another right.

With regard also to assignments *inter vivos*, which are of mere rights of suit, if these rights are incidental to other rights, such assignments are valid. An assignee of a debt received a covenant from the assignor that the debt was still subsisting, not knowing, as the fact happened to be, that the debt had been actually paid. He then, in turn, assigned all his right, title and interest, in and to such debt to another party; it was decided that this second assignee was entitled to sue on the covenant made by the first assignor; and it was also held that this did not amount to champerty or maintenance, as the second assignor and assignee respectively professed to sell and buy the debt, and they both believed that they had the title and interest in the subject of the assignment, the transfer of the debt being the principal subject of transfer, and the right of suit for breach of covenant being incidental to it only. (*Cole* v. *Bank of Montreal*, 39 U. C. R., 54). As remarked by Wilson, J., at page 66, if a bank "had assigned fifty shares of their stock, which they would be at liberty to hold, and they had

no such stock, and covenanted for title to it, they could not assert in Court to an action by their assignee for breach of covenant that they had no such stock, and that the covenant was therefore void. And that which they could not do at the suit of their immediate assignee, they cannot do at the suit of a more remote assignee, so long as the subject matter—if existing or subsisting in fact—is capable of being assigned as lands always were, and as choses in action are now by virtue of the Statute." (See also post "Party having an interest in the subject matter" in this chapter.

Contracts made in Foreign Country.

As a general rule, a contract will not be enforced unless it is valid by the law both of the country in which it was made and of that in which it is sought to be enforced, so that if it is void according to the policy of the law of either country, it will be voided altogether. Thus, if an agreement to be carried into effect in England, which, if made in England, would have been void on the ground of champerty, was held to be not the less void because made in the foreign country where such contract would be legal. (*Grell* v. *Levy*, 16 C. B. N. S., 73).

Nominal litigant under direction of others.

A shareholder purchasing shares in order to file a bill, is not guilty of maintenance, but he must not be a mere nominal instrument in the hands of others; thus, where the plaintiff admitted that he was suing by the *direction* of a rival company and in order to protect their interests, his bill was dismissed on the ground of maintenance. *Forest* v. *Manchester, etc. Ry. Co.*, 9 W. R., 818).

Maintenance a ground for action on the case.

Besides vitiating contracts in which they are found to

enter, champerty or maintenance will also at common law furnish ground for an action on the case by the person injured by the litigation set on foot by the maintainer. Thus, where A, instigated B, a pauper, to bring suit without reasonable cause against C, it was held that C was entitled to recover against A, the measure of damages being the costs and expenses incurred by C, in defending the action brought by B. (*Pechell* v. *Watson*, 8 M. & W., 691); but see *Cotterel* v. *Jones*, 11 C. B., 713, and *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*, L. R. 2 App., 186.

Rules of Maintenance relating to Attorneys.

Attorneys are specially prohibited by Stat. Westm. 2 c., 49 a, from purchasing the subject matter of suits during litigation, and no consideration of kindred or affinity will excuse them. In *Hall* v. *Hallet*, (1 Cox, 134), Lord Thurlow stated the law to be clear, that "no attorney can be permitted to buy in things in course of litigation, of which litigation he has the management. This the policy of justice will not endorse." This rule applies to attorney managing suit, although not attorney on the record. (*Simpson* v. *Lamb*, 7 E. & B. 84, 5 W. R., 227).

An agreement to prosecute claim, and, in case, of success, to receive part of sum recovered, and nothing for costs in the event of failure, is substantially champerty. (*Hilton* v. *Woods*, L. R., 4 Eq., 432); but if the work is done and the client receives the benefit of it, the solicitor will be entitled to his costs as between solicitor and client. (*Grell* v. *Levy*, 16 C. B. N. S., 73; and the rule that such a transaction is champerty does not apply to purchase by attorney from his client's co-plaintiff or co-defendant, claiming by same title as attorney's own client, for an attorney may purchase what anyone else may purchase, unless it be from his own client. (*Knight* v. *Bowyer*, 2 DeG. & J., 421, 4

Jur. N.S., 573); and the rule does not extend to a mortgage of the client's own interest in the subject matter, and an assignment of it after verdict and before judgment to the attorney is valid. (*Anderson* v. *Radcliffe*, E. B. & E. 806, 819; 7 U. C. L. J., O. S., p. 23).

Although at one time what is now a common practice, that of an attorney laying out his own money for his client in a suit was considered illegal, yet it is now settled that "there is no doubt but that an attorney may lawfully prosecute or defend an action in the court wherein he is an allowed attorney, in behalf of any one by whom he is specially retained, and that he may assist his client by laying out his own money for him, to be repaid again, and also may maintain an action against him for the same, by virtue of such retainer, without any special promise." (Hawk., P. C., Vol. 1, 460.) An attorney may also agree to take a fixed sum in full of all costs, to bring a case to a conclusion, and if he agree to conduct a suit on terms of receiving only costs out of pocket, in case of non-success (without agreeing for portion of subject matter of suit in case of success,) such agreement is valid, (*re Whitcombe*, 8 Beav., 140; *Thwaites* v. *Mackerson*, 3 C. & P., 341.)

There appears to be no objection to the legality of an agreement between an attorney and e.g. an insurance office, that the former would accept a certain salary, in lieu of rendering an annual bill of costs for general business transacted by him for the company, as such attorney and solicitor; and for such salary would advise and act for the said company on all occasions, in all matters connected with the said company, (*the prosecution or defending of suits*, the preparation of bonds, or other securities, for advances by the said company, and money disbursements by the attorney being excepted, and the attorney being allowed in respect of such matters to make the usual regular charge

of an attorney and solicitor.) But it may be doubted if the exception, so far as it relates to the prosecution and defence of suits, had not been introduced, whether such arrangement would have been clear from maintenance. (Tapp. p. 97, see *Elderton* v. *Emmens*, 6 C. B., 160; *Penrice* v. *Parker*, Finch, 75, and *McEgan* v. *Cochrane*, 10 Law Times, 37.)

Exceptions to law of Maintenance.

There are certain general exceptions which make matters (otherwise within the law against maintenance) free from the objection. Chief among these is that of relationship.

Relationship.

It has been held that near relatives have such an interest in suits that they may validly interfere in them; the objection of maintenance, therefore, does not apply to persons standing in the relation of parent and child, husband and wife; and a master may even assist his servant in litigation. But such a relationship as that of a cousin, is not sufficient to come within this exception. (See Hawk. P. C., 8th ed. 458; *Burke* v. *Green*, 2. B. & B., 517; *Moore* v. *Usher*, 7 Sim., 383; *Perssee* v. *Perssee*, 7 Cl. & Fin., 279; *Hutley* v. *Hutley*, L. R., 8 Q. B., 112.)

Party having an interest in the subject matter.

Where a party has an interest in the thing in dispute, or has a fair and reasonable ground for believing that he has rights in common with the parties to the suit, he may then lawfully, assist in either the maintenance or defence of such rights.) *Findon* v. *Parker*, 11 M. & W., 675; *Hunter Daniel*, 4 Ha., 420.) *Williamson* v. *Henley*, 6 Bing., 229. A more rigid rule prevailed formerly, even while the assignment of choses in action was recognized, but

the rule in modern cases is well expressed by Lord *Abinger* in *Findon* v. *Parker*, (11 M. & W., 675.) "The sole question" he said during the argument of the case "is, have the parties an interest, or do they believe they have an interest in the action ?"

In a very recent case in our own Chancery Reports (*Moberly* v. *Brooks*, 27 Grant, 270), a valuator of a loan company relied on the representations made by one W. B. that he, W. B., had conveyed certain properties to his nephew, E. B., and that E. B. wished to borrow $1,000 on certain property, worth $2,470 as fraudulently asserted by W. B., whereas, it appeared that the land was worth, at the most, only $1,300, and that the loan was actually for the benefit of W. B., the conveyance to E. B. being only part of a scheme to raise the money ; the loan company, on the faith of the valuator's appraisement, founded on the representations of W. B., advanced $1,000 on the property ; but, having been compelled to sell, sold for only $800, partly on cash and partly on credit. The valuator, (the plaintiff, *feeling that he was liable to the company*, settled with them for the balance due them, ($470), and took an assignment of the mortgage; it was held that although W. B.'s liability arose out of a tort, it was assignable in equity, on the ground, that where a party has an interest in the subject matter of the assignment, or believes that he *bona fide* has such an interest, the doctrine of maintenance does not apply, and that the plaintiff was not a stranger to the matter in question. "He was himself" said Proudfoot, V. C., "liable for the effect of his misrepresentations, or, what is sufficient, he believed himself liable for it."

The case of *Cole* v. *Bank of Montreal*, cited on a previous page, is in point with this case. (See also *Hill* v. *Boyle*, L. R., 4 Eq., 260).

A right to rescind fraud may pass to an assignee of a contract, if at the time of the assignment the fraud is unknown. (*Wilson* v. *Short*, 6 Hare, 306).

Other cases where Maintenance does not apply.

The last cited cases show that it is not every transfer of the subject matter of pending litigation which will be considered maintenance. It is hard to point out clearly the border line between what is maintenance and what is not. Like the definition of fraud in equity, no general definition can be framed, and, perhaps, for reasons similar in both instances, will never be authoritatively attempted. As said by Lord Kingsdown in *Fisher* v. *Naicker*, (2 Law Times, N. S., 94), a transaction that will amount to maintenance "must be something against good policy and justice, something tending to promote unnecessary litigation, something that, in a legal sense, is immoral, and to the constitution of which, a bad motive, in the same sense, is necessary. It was necessary, therefore to look to the substance of the transaction, and not merely to the language of the instruments."

It was at one time considered that a contract of indemnity against costs by the assignee of a chose in action in favor of the assignor constituted maintenance, but this is not now the rule, (*Harrington* v. *Long*, 2 M. & K., 590). So with the contract (under the law as it formerly existed), on the part of the assignor allowing the assignee to use his name in bringing the action; it was held that this was maintenance, but later decisions overruled this strange doctrine. (See *Wood* v. *Griffith*, 1 Swanst, 55). Indeed, as pointed out by Lord Eldon, in this case such contracts were necessarily implied when they were not expressed. "A person claiming under that contract" he says, "becomes in equity a trustee for the persons with whom he

afterwards contracts; without entering into any covenants for that purpose, they are obliged to indemnify him from the consequences of all acts which he must execute for their benefit; and a court of equity not only allows, but actually compels him to permit them to use his name in all proceedings for obtaining the benefit of their contract."

Although an assignee can now sue at law in his own name under the Statute, yet, in such cases as come within the scope of *Hostrawser* v. *Robinson*, 23 U. C. P., 350; cited in Chap. IV. of this work, the last mentioned rules will apply. Other cases to the same effect as *Wood* v. *Griffith*, are *Hartley* v. *Russell*, 2 Sim. & St., 244; *Cockell* v. *Taylor*, 15 Beav., 103; *Myers* v. *United Guarantee Society*, 7 DeG. & M. 112; *Williams* v. *Protheroe*, 3 Y. & J., 129).

On what grounds contracts of Maintenance are set aside.

Although courts of equity will set aside a contract savoring of maintenance or champerty, yet when they do so, they will allow it in some cases to stand for the amount which the party is *bona fide* entitled to. (See *Skapholme* v. *Hart*, Rep. t. Finch, 477; *Strachan* v. *Brander*, 1 Eden, 303; *Wood* v. *Downes*, 18 Ves., 120).

CHAPTER X.

CHOSES IN ACTION OF MARRIED WOMEN.

Married women not entitled to sue formerly.

Husband entitled at common law to choses in action of wife which she had before marriage,

Choses in action of wife acquired during coverture.

What is a reduction into possession?

Assignment, and release by husband of wife's choses in action.

The status of Married Women in Equity.

Ante nuptial settlements—Effect on choses in action.

Wife's Equity to a settlement.

Separate use.

Statutes relating to married women.

In this chapter the personal rights of a married woman, whether arising out of contract, or out of tort, will be treated of: the subject will be considered under its equitable, common law and statutory aspects respectively. It will be understood that it is her right to sue, and not her liability of being sued, her choses in action, and not her obligations which are to be here discussed.* These subjects and

*With regard to the liability of married women, on contracts made by them, which liability is often correlative to the rights which they possess, (being interdependent in many instances,) the following cases may be consulted:—*Johnson* v. *Gallagher*, 3 DeG. F. & J., 494; *Collet* v. *Dickinson*, L. R. 4 Ex. D. 285; L. R. 11. Ch. D., 687; *Dillon* v. *Cunningham*, L. R. 8 Ex. 23; *London Chartered Bank of Australia* v. *Lempriere*, L. R., 4 P. C., 572; *Merrick* v. *Sherwood*, 22 U. C. C. P., 467, and cases there cited; *Field* v. *McArthur*, 27 U. C. C. P., 15; *Meakin* v. *Sampson*, 28 U. C. C. P., 355; *Poole* v. *Canning*, L. R., 2 C. P., 241; *Commercial Bank* v. *Merritt*, 21 U. C. R., 258; *Adams* v. *Loomis*, 22 Gr., 99; *Boustead* v. *Whetmore*, 22 Gr., 222; *Kerr* v. *Stripp*, 24 Grant 198; *Kerr*, et al. v. *Stripp*, et al., 40 U. C. R., 125; *Harrison* v. *Douglas*, 40 U. C. R., 410; *Denham* v. *Brewster*, 28 U. C. C. P., 607; *Wagner* v. *Jefferson*, 37 U. C. R. 551; *Frazee*, et al. v. *McFarland*, et al., 43 U. C. R., 281; *Brown*. et al. v. *Winning*, 43 U. C. R., 337; *Lawson* v. *Laidlaw*, 3 Tupper App. R. 77; *Standard Bank* v. *Boulton*, 3 Tupper 93; *Lloyd* v. *Pughe*, L. R., 14 Eq. 241; *Carnegie* v. *Carnegie*, 22 W. R. 595; *De Serre* v. *Clarke*, L. R. 18 Eq.

kindred others are frequently so intermixed, owing to the peculiar laws relating to married women, that it is difficult to separate them. To bring them into this chapter would expand it into a treatise, much beyond the extent of the rest of the volume. So far, then as it can be done, the subject which will now be alone treated of, will be the choses in action of married women.

Married women not entitled to sue formerly.

In the early history of English law, married women, as litigants, were almost unknown to the courts, and when they did appear it was in company with their husbands, whom they were required to have joined with them in bringing an action. There were certain exceptions made to this rule, as when the husband was outlawed, and therefore civilly dead, (ex parte *Frank*, 7 Bing. 762; *Marsh* v. *Hutchinson*, 2 B. & P., 231,) and where the husband was a foreigner, belonging to a country at war with Great Britain, (*Barden* v. *Keverberg*, 2 M. & W., 61.)

The first appearance of a lone married lady suitor in court, was the occasion of so much surprise, that a Latin distich preserved in Coke's Institutes commemorates the event. It is worthy to relate that this *feme covert*, who, as such was the first pioneer in the perilous paths of litigation, won her suit.

Husband entitled at common law to choses in action of wife which she had before marriage.

Although, as remarked in Jacob's edition of Roper on Husband and Wife, "the extent of the husband's power, [at

587; *Green* v. *Carlill*, L. R. 4 Ch. D. 882; *Austin* v. *Austin*, *Austin* v. *Boyce*, L. R., 4 Ch., D. 233; *Halfpenny* v. *Pennock*, 33 U. C. R. 229; *Picard* v. *Hine*, L. R. 5 Ch. Ap., 274.) In the above cases, a married woman's liability (either in equity or under the Married Women's Acts, with reference to property she actually owns, or professes to own, as also her trading separately from her husband) is considered, and the principles governing the same are laid down.

common law] over the wife's choses in action, is a subject on which there has been considerable difference of opinion," yet it was a clearly settled fundamental principle, that the husband was entitled to the wife's choses in action; but they did not become his property until reduced into possession by him. This reduction into possession was a condition precedent upon which the law gave the wife's choses in action to the husband. (*Purdew* v. *Jackson*, 1 Russ., 24; *Mitchinson* v. *Hewson*, 7 T. R., 348; *Milner* v. *Milner*, 3 T. R., 627; Blackstone Comm., Vol. II., 434; Comyn Dig. tit., "Baron and Feme" E. 3).

As a result of the common law doctrines, the wife's personal property being absolutely vested in her husband, and her choses in action being vested in him in the qualified manner just mentioned, he had to be joined with her in any action brought against her; the result of this was, practically, that a man became, on his marriage, liable for the debts of his wife previous to marriage. As will be seen, hereafter, when treating of the Married Women's Acts, a husband is relieved from such burdens.

To return to the wife's choses in action. In the event of the husband surviving the wife, and that he had not reduced the choses in action into his possession during the wife's life, then upon her death, the only way in which he became entitled to them, was as her administrator; and in case the husband also died, without having taken out letters of administration, his administrator could not recover her choses in action, for it was necessary that administration should be taken out to the wife's estate.

In the converse case of the wife surviving her husband, her right to her choses in action accrued to her before marriage survived, assuming, of course, that the husband had done no act to reduce them into possession. (*Rumsey* v. *George*, 1 M. & Sel., 180; *Fitzgerald* v. *Fitzgerald*, 8 C.

B., 592.) The husband became, at common law, as it were, the irrevocable attorney of the wife, with respect to any debts due her before the marriage; by reducing them into his possession, they belonged to himself; in the event of his not having done so, they continued to be the choses in action of the wife, and in the event of his death, they survived to her. (See above cases; see also *Sherrington* v. *Yates*, 12 M. & W., 855.)

With regard to personal property in possession of the wife, which she had before marriage, (such as chattels personal,) they, unlike choses in action, required no act of the husband to make them his; the marriage, *ipso facto* vested them in the husband, and they became his immediate and absolute property. (See Blackstone Vol. II., p. 435.) With regard to promissory notes, it was at one time held by Lord Ellenborough, in *McNeilage* v. *Holloway*, (1 B. & Ald., 221,) that "a promissory note may be treated as a personal chattel in possession," but this doctrine was overruled in subsequent cases, and it was established that promissory notes and bills of exchange were choses in action, and, following the ordinary rule regarding choses in action, they required some act of the husband amounting to a reduction into possession, to vest them in him. (*Richards* v *Richards*, 2 B. & A., 447; *Fenner* v. *Plaskett* Moore, 422; *Gaters* v. *Madely*, 6 M. & W., 427; *Sherrington* v. *Yates*, 12 M. & W., 855; *Hart* v. *Stephens*, 6 Q. B., 937.)

As to contracts between the husband and wife before marriage, by which the husband became indebted to the wife, or *vice versa*, such contracts became by the marriage, utterly extinguished, (Com. Dig. tit. "Baron and Feme" D. 1.) After marriage, the husband and wife being regarded in law, as one person, they could not contract with one another; a man to contract with his wife after marriage,

would, therefore, be contracting with himself. (See Blackstone Comm. Vol. I., p. 442.)

Choses in action of wife acquired during coverture.

The husband was, at common law, entitled to the benefit of all contracts executed by the wife, and of all executory contracts made by her, without his knowledge, but for his benefit, (*Millard* v. *Harvey*, 34 Beav., 237). On the other hand, the wife could not bind herself; under some circumstances, the husband was alone entitled to the benefit of the wife's contracts made during coverture, while in other cases, he could, if he chose, join her as co-plaintiff in an action brought to enforce them; when there was an express promise made to the wife, and when the consideration upon which the promise was founded, moved from her, the husband and wife were required to join together. (*Buckley* v. *Collier*, 1 Salk., 114.) Upon his death, as stated above, in regard to choses in action of the wife acquired previous to coverture, so, in regard to contracts made with her during marriage, she was entitled by survivorship, to claim them, unless they had been reduced into his possession by her husband, during his life. (*Brashford* v. *Buckingham*, 7 M. & S., 396.) The husband was even entitled to the fruits of her industry, as appears by this last cited case, and *a fortiori* he was so entitled, when the materials furnished were the property of the husband. (See *Day* v. *Padrone*, 2 M. & S., 396; *Phillis Kirk* v. *Pluckwell*, 2 M. & S., 393; *Wills* v. *Norse*, 1 A. & E., 65; *Abbot* v. *Blofield*, Cro. Jac., 644; *King* v. *Barsingham*, 8 Mod., 199.)

The judgment of Baron Parke in *Gaters* v. *Madely*, is instructive. In this case, (6 M. & W., 423) a promissory note was given to a woman while she was married. She having survived her husband, and then died, her executor

brought an action on the note, and it was held that he was entitled to recover. "This," said the learned Baron, "is an action on a promissory note, an instrument on which no one can sue, unless he was originally party to it, or has become entitled to it under one who was. A promissory note is not a personal chattel in possession, but is a chose in action of a peculiar nature. It has, indeed, been made by Statute assignable and transferable, according to the custom of merchants, like a bill of exchange. Still, it is a chose in action, and nothing more. When a chose in action is given to a feme covert, the husband may elect to let his wife have the benefit of it, or, if he thinks proper, he may take it himself, and if in this case the husband had in his lifetime brought an action upon this note in his own name, that would have amounted to an election to take it to himself, and to an expression of dissent on his part, to his wife's having any interest in it. On the other hand, he may, if he please, leave it as it is; and in that case, the remedy on it survives to the wife, or he may adopt another course, and join her name with his own; and in that case, if he should die after judgment, the wife would be entitled to the benefit of the note, as the judgment would survive to her." (See also *Burrough* v. *Moss*, 10 B. & C., 558; *Fleet* v. *Perrins*, L. R., 4 Q. B., 500.)

The non-joinder of a husband in an action must be pleaded in abatement; it is not pleadable in bar. The reason of this seems to be that the right of action *prima facie* belongs to the wife, and in the event of her husband not reducing it into possession, it would survive to her. (*Soules* v. *Doan*, 39 U. C. R., 337; *Bendix* v. *Wakeman*, 12 M. & W., 97; *Dalton* v. *Midland Railway Company*, 13 C. B., 474; *Metropolitan Railway Company* v. *Wilson*, L. R., 6 C. P., 376.)

What is a reduction into possession ?

The receipt by the husband, of money due to the wife, is a reduction into possession by him, (*Jones* v. *Cuthbertson*, L. R., 2 P. C., 83; *Bosvil* v. *Brander*, 1 P. W., 458; *Rees* v. *Keith*, 11 Sim., 390.) So, if he appoints a party to receive money, who does so, such money is reduced into his possession, and his personal representative and not his wife, is entitled to recover the money from such person who so received it, (*Huntley* v. *Griffith*, Moore 522; *Temple* v. *Temple*, Cro. Eliz., 791.) But if the money is received by such agent for certain specified objects for the husband and wife jointly, this is not a reduction into possession, and in the event of the husband's death, his wife, and not his personal representative, is entitled to claim the money, (*Jones* v *Cuthbertson*, supra.) The receipt of interest by the husband on a promissory note made to the wife before her marriage, is no evidence of a reduction into possession by the husband. (*Hart* v. *Stephens*, 6 Q. B., 937.)

Where proceedings are taken by a husband in the joint names of himself and wife, for the purpose of reducing the wife's choses in action into possession, and before judgment is obtained, the wife happens to die, the husband's right is lost, and the debt sued for, vests in the personal representative of the wife. *Checchi* v. *Powell* 6 V. & C., 253; 9 D. & R., 243; *Gabriel Mile's* case, 1 Mod., 179; see also *Scrutton* v. *Pattillo*, L. R., 19 Eq., 369.) But by the entry of judgment during the wife's life, the reduction into possession is complete, and the chose in action is so vested in him that he may have execution in his own name, (*Ibid*). In the case of the husband dying after joining his wife in the suit with him, she may, on her part, enter a suggestion of his death on the record, and prosecute the suit for her own benefit; even if judgment is recovered in their joint names, she may issue execution for her own

benefit. (*Sherrington* v. *Yates*, 12 M. & W., 865; *Bond* v. *Simmons*, 3 Atk., 21; *Nanney* v. *Martin*, 1 Ch. C. 27.)

As to reduction into possession, see also *Widgery* v. *Tepper*, (L. R., 5 Ch. D. 516; 7 Ch. D., 423); *Nicholson* v. *Drury Building Estate Co.* L. R., 7 Ch. D. 48.) In the latter case it was held that the transfer of shares into the joint names of husband and wife was not a reduction into possession. This case was where a protection order having been obtained by a wife on the ground of desertion by her husband, the question arose between them as to which of them was entitled to the shares of the wife, transferred as above into their joint names, before the date of the protection order.

Even, though a husband has not reduced into possession a chose in action belonging to his wife, the mere forbearance of the husband from taking steps to recover the unrecovered debt due to the wife will support a promise made to himself alone, *Rumsey* v. *George*, 1 M. & S. 180) and this right of his, is one with which the wife cannot interfere, and his agreement to forbear will not, on the other hand be binding on her in case of his death (see *Lea* v. *Minnie*, Yelv. 84.)

Assignment and release by husband of wife's choses in action.

It was for a long time a question of much dispute as to whether the husband by assigning his wife's choses in action, by virtue of such assignment, performed such a reduction into possession as would divest the right of survivorship of the wife in favor of the assignee. Conflicting decisions were arrived at, and the subject was made the theme of lengthy dissertations by various text writers. (*See* No. 3 of the Addenda to Jacob's edition of Roper on Husband and Wife and Nos. 2 and 3 of the Appendix to

Bright on Husband and Wife.) The leaning of the Courts was at first in favor of the assignee of the husband, thus barring the right of the wife in the event of his death. This rule was first reversed in regard to the assignee in bankruptcy of the husband: it was next overruled in regard to reversionary choses in action, but it is now swept away altogether, and it is now settled that, although the husband may, by contract bind himself with his assignee, yet his contract cannot have the effect of binding the wife who is not privy to the contract. (*Stiff* v. *Everett*, 1 Myl. & Cr., 37; *Hornsley* v. *Lee*, 2 Madd., 16; *Purdew* v. *Jackson*, 1 Russ. 1, *Jewson* v. *Moulson*, 2 Atk., 420; *Jacobson* v. *Williams*, 1 P. W., 382; *Burdon* v. *Dean*, 2 Ves., 607; *Mitford* v. *Mitford*, 9 Ves., 87; *Pierce* v. *Thornley*, 2 Sim. 167; *Elliott* v. *Condell*, 5 Mad., 149; *Macauley* v. *Phillips*, 4 Ves. 19; *Pryor* v. *Hill*, 4 Bro. C. C., 139; *Pope* v. *Crashaw*, 4 Bro. C. C., 326; *Johnson* v. *Johnson*, 1 Jac. & W., 472; *Harwood* v. *Fisher*, 1 Y. & C. Ex., 112; *Honner* v. *Morton*, 3 Russ., 64; re *Carr's* Trusts L. R., 12 Eq., 609.) The law as it now stands in this regard, is virtually a consequence of the principle that the assignee of a chose in action takes the same subject to the equities which exist against the assignor, (see pages 48 and 63) the husband—the assignor—holding the same subject to the wife's right of survivorship, unless he has reduced the chose in action into his possession.

A release of the wife's chose in action by the husband stands on the same footing generally as an assignment by him, and therefore the above rules of law will by analogy apply to releases as well as assignments. Thus in *Kemp* v. *Kelsey*, (2 Eq. Ca. Ab., 267), it was decided that the husband had no power whatever to release a future equitable right of his wife; that in the event of her surviving him, she would be entitled to it in her own right. See also *Bush* v. *Dalway*, 1 Ves. Sen. 19; 3 Atk. 530; *Metcalf* v. *Ives*, 1 Atk., 93.

However, the law was formerly in regard to such releases equally with assignments, that the husband could release such choses in action in which he had, at all events, an *immediate* interest, and all rights accruing to the wife during coverture (see *Gage* v. *Acton*, 1 Salk., 327 and dictum of Lord Hardwicke in *Bates* v. *Dandy*, 2 Atk., 208) and on the marriage he might release all debts then due to the wife, (2 Roll. Abr., 210 : Shep. Touchst. 333.) These immediate interests, it was held might have been *released* by the husband, although future and reversionary rights could not be released by him. As far as *releases* are concerned, the law as above stated seems not to be expressly overruled; but, as been above intimated, the action of the husband in releasing his wife's choses in action is analogous to his making an assignment of them, the present state of the law in regard to assignments by a husband of his wife's choses in action will govern equally in regard to releases of them.

The status of Married Women in Equity.

The above doctrines prevailed at common law; in Equity, married women, in many respects were placed in regard to their rights, in a more favorable position than at law. "Courts of Equity," as said in Taylor's Equity, "for many purposes have continually treated husband and wife as distinct persons capable (in a limited sense) of contracting with each other, and of suing each other, and of having separate estates, debts and interests." (Taylor's Equity, sec. 1163.) Thus, though at common law, an agreement between husband and wife before marriage became dissolved on the marriage, Equity nevertheless, will frequently carry such an agreement into effect. Thus in the recent case of *Boustead* v. *Shaw*, (27 Grant, 280) a husband and wife having made a verbal agreement with each other and without any intervention of trustees before marriage, that in

consideration of marriage, the husband would make a provision in favor of his wife, a settlement having been made after marriage for her benefit, it was held valid against creditors.

Even with regard to post nuptial contracts, Equity has gone so far as under special circumstances to ratify them and carry them into effect. "Thus" as said in the valuable work of Mr. Taylor already quoted "if a wife having separate estate should *bona fide* enter into a contract with her husband to make him a certain allowance out of the income of such separate estate for a reasonable consideration, the contract, although void at law, would be held obligatory and would be enforced in equity. So, if the husband should, after marriage, for good reasons, contract with his wife, that she should separately possess and enjoy property bequeathed to her, the contract would be "upheld in Equity." (Taylor's Equity sec. 1165. See *More* v. *Freeman*, Bunb. 205; *Harvey* v. *Harvey*, 1 P. W., 125, 126; 2 Veru. 659, 760; Com. Dig. "Chancery" 2 M. 11, 12, 14.)

Althougn, as said by different writers, Equity followed the law in regard to the common law principles which governed married women's rights, yet the variances which were made were great. It is the more important in view of our recent statutes to know the equitable principles relating to married women's property including her choses in action: because, these statutes, although very perplexing and ambiguous seem to be in spirit the reflex of equitable doctrines. As said by Patterson, J. A., in *Lawson* v. *Laidlaw*, (3 Tupper App. R. 77, at page 87.) "Our Statutes have done for married women what was previously effected by the doctrines of Equity and by the machinery of settlements and trusts, by creating or recognizing the capacity to hold and enjoy property for their separate use."

Ante Nuptial settlements—Effect on choses in action.

A settlement on marriage, generally gives to the husband his wife's fortune. A mere settlement, however, will not *per se* entitle the husband to the wife's *choses in action:* there must be an agreement either express or implied. (See Bright on Husband and Wife Bk. II., chap. I.) In *Druce* v. *Dennison* (6 Ves. 395), Lord Eldon lays it down as established that a settlement to be the purchase of the wife's fortune must either express it to be for that consideration or the contents of the settlement must altogether import that, and plainly import it, as much as if it were expressed. (See *Heaton* v. *Hassel*, 4 Vin. Abr., 40; *Adams* v. *Cole*, Forrest, 168; *Cleveland* v. *Cleveland*, Pre. Ch., 63; *Garforth* v. *Bradley*, 2 Ves. Sen. 675; *Burdon* v. *Dean*, 2 Ves. Jun., 607; *Lady Elibank* v. *Montolieu*, 5 Ves., 737; *Mitford* v. *Mitford*, 9 Ves., 89.)

As to where the provision made under a settlement by the husband for the wife is executory, see *Pyke* v. *Pyke*, 1, Ves., 376; *Basevi* v. *Serra*, 14 Ves., 313: Meriv. 674; and as to the wife being entitled in such cases to a lien upon her own property see *Mitford* v. *Mitford*, 9 Ves. 96.

By the 26th section of the Married Woman's Property Act, (Rev. Stat. Ont., Cap. 125), it is provided that nothing in the Act shall be construed to prevent any anti-nuptial settlement or contract being made in the same manner and with the same effect as such contract or settlement might be made as if the Act had not been passed; the section further provides that notwithstanding any such contract or settlement, any separate real or personal property of a married woman, acquired either before or after marriage, and not coming under or being affected by such contract or settlement, shall be subject to the provisions of the Act, in the same manner as if no such contract or settlement had been made; and as to such property, and her personal earnings

and acquisitions therefrom, such woman shall be considered as having married without any marriage contract or settlement.

Wife's Equity to a settlement.

If a husband is required to resort to Equity to aid him in the recovery of his wife's choses in action, as, when they are vested in trustees, he is compelled to make a separate provision for her, and this is called the wife's Equity to a settlement.

In Story's Equity (sec. 1408, this right of a married woman (the origin of which is shrouded in obscurity) is thus described: "A settlement will be decreed to the wife whenever the husband seeks the aid or relief of a Court of Equity to procure the possession of any portion of his wife's fortune. In such a case it is of no consequence whether the fortune accrues before or during the marriage; whether the property consists of funds in the possession of trustees, or of third persons: or whether it is in the possession of the Court or under its administration, or not; for under all these circumstances, the equity of the wife was for a long time supposed to be confined to the absolute personal property of the wife." This learned author then proceeds to show how this equity extended to the rents and profits of real estate.

In *Barrow* v. *Barrow*, (24 L. J., Ch. 198) it was decided, that if after the marriage, the wife is unable to live with the husband in consequence of his misconduct, she has a right, as against him, to have her unrecovered choses in action, among other property belonging to her, settled upon her.

Separate Use.

With regard to real estate also, Equity conferred on a married woman the benefit of having property to her

separate use, free from the control of her husband. (See Taylor's Equity, ss. 1171 to 1184.)

Married women can in Equity make contracts with reference to this separate property. By this is meant, not that a married woman can bind her husband or her property generally, but that in the event of her binding herself with reference to this separate property, the remedy allowed would be only against this separate property. (See note at the beginning of this chapter.) With this limited liability, she had correlative rights.

Statutes relating to Married Women.

There have been various statutes passed in this Province relating to Married Women's property: those which affect her choses in action are Con. Stat. U. C., cap. 73, and 35 Vic., cap. 16. These two statutes are incorporated into the Revised Statute of Ontario, cap. 125. The first of these was passed on the 4th May, 1859, and the latter on the 2nd March, 1872. By this explanation the reader will understand the dates mentioned in the sections cited in this chapter.

The second section of the Revised Statute is as follows:—

"Every woman who, on or before the fourth day of May, One thousand eight hundred and fifty-nine, married without any marriage contract or settlement, shall and may from and after the said day, notwithstanding her coverture, have, hold and enjoy all her real estate, not on or before the said fourth day of May taken possession of by her husband, by himself or his tenants, and all her personal property not on or before said day reduced into the possession of her husband, whether belonging to her, before marriage, or in any way acquired by her after marriage, free from his

debts and obligations contracted after the said fourth day of May, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried. C. S. U. C., c. 73, s. 2."

As to the words "reduced into the possession of her husband" see *ante* the sub-heading of this chapter entitled "What is a reduction into possession?"

When the question arose in *Black* v. *Coleman*, (29 U. C. C. P., p. 507) as to whether this section applied to personal property acquired by a married woman after 4th May 1859, who was married before that day, Wilson, C. J., said that the section was not well expressed and that there was ground for the contention that it did not apply. But he added, that such a limited construction would be against the policy of the different statutes which have been passed on the subject.

A bill of sale executed by a man a few days before marriage, by which he assigned his furniture, etc., to his intended wife, in consideration of an agreement for such assignment for the purpose of making a provision for her support and maintenance, was held not to be a contract or settlement within the meaning of the words "marriage contract or settlement." (*Leys* v. *McPherson*, 17 U. C. C., P. 266.)

The effect of Con. Stat., cap. 73, was not to give the wife the power to *dispose* of her personal estate, but to protect her in the possession and enjoyment of it. (*Royal Canadian Bank* v. *Mitchell*, 14 Grant, 412; *Balsam* v. *Robinson*, 19 U. C. P., p. 266; *McGuire* v. *McGuire*, 23 U. C. C., p. 123; but see *Chamberlain* v. *McDonald*, 15 Grant, 448.)

The power of disposing of the wife's choses in action was to a certain extent granted to her by the later Statute 35

Vic., cap. 16. (Ont) The second section of this Statute is re-enacted in the seventh section of the Revised Statute as follows :

"All the wages and personal earnings of a married woman, and any acquisitions therefrom, and all proceeds or profits from any occupation or trade which she carries on separately from her husband, or derived from any literary, artistic or scientific skill, and all investments of such wages, earnings, moneys or property, shall, after the said second day of March, one thousand eight hundred and seventy-two, be free from the debts or dispositions of her husband, and shall be held and enjoyed by such married woman and disposed of without her husband's consent as fully as if she were a *feme sole ;* and no order for protection shall hereafter be necessary in respect of any such earnings or acquisitions ; and the possession, whether actual or constructive of the husband, of any personal property of any married woman shall not render the same liable for his debts."

By the order of protection mentioned in this section, (which is now unnecessary) is meant the order of protection which was provided for by the 5th and 6th sections of Con. Stat., cap. 73. This order is still necessary in regard to the earnings of minor children, (see sec. 8 of the Revised Statute,) which earnings are made the property of the wife, in the event of her having obtained a decree of alimony and in other cases mentioned in the section. (see Appendix.)

In an English case it was decided that a wife who had been deserted by her husband and obtained a protection order, might maintain in her own name an action for libel. (*Ramsden* v. *Brearly*, L. R. 10, Q. B. 147.)

The provisions of the seventh section of Rev. Stat. Ont., cap. 125 above quoted, are conveniently classified in Mr. Walkem's work on Married Womens' Property Acts. At

p. 42 of this work, he says that this section "operates as a settlement to the married woman's separate use, of the following classes of property:—

1. All the wages and personal earnings of a married woman, and any acquisitions therefrom.

2. All proceeds and profits from any occupation or trade which a married woman carries on separately from her husband.

3. All proceeds or profits derived by a married woman from any literary, artistic or scientific skill.

4. All investments of such wages, earnings, moneys, or property."

It will be observed that the choses in action of married women, which are thus given to their separate use, are limited, although the limit is a wide one. The second section, (*see ante*) it seems of the Revised Statutes would include all classes of choses in action. Thus it happens, that although a married woman has to her separate use, all her real as well as personal estate (including her choses in action) she has not the *jus disponendi* except as to such as are above classified.

As to other choses in action, they would be in the same position as before, 35 Vic., cap. 16. (*See McGuire* v. *McGuire*, 23 U. C. C., p. 123.)

This 7th section applies to all married women whether married before or after the passing of the Act 35 Vic., cap. 16. (*Harrison* v. *Douglas*, 40 U. C. R., 410.)

As to the mode in which the occupation or trade is carried on. This section does not apply to any occupation or trade in which the husband is held out to the world as

the person conducting it, or, which the wife cannot carry on without his active co-operation or agency. The husband need not be physically absent to make it her separate trade or occupation, but she cannot be properly held to carry it on separately from him, so long as he does all to make the business successful. (*Harrison* v. *Douglas* supra; *Laporte* v. *Costick*, 31 L. T. N. S., 434.) And where the transaction is a contrivance simply to protect the husband from his creditors it is not her separate trade or occupation. (*Ibid;* See also *Clark* v. *Morrell*, 21 U. C. R., 596; *Graham et al.* v. *Furber*, 14 C. B., 410.)

It is a question of fact on the evidence whether a particular occupation or trade is the separate occupation or trade of the wife. (*Ibid; Lett* v. *The Commercial Bank*, 24 U. C. R., 552; *Foulds* v. *Curtelett*, 21 U C. C. P., 363; See *Irwin* v. *Maughan*, 26 U. C. C. P., 455; *Plows* v. *Maughan*, 42 U. C. R., 129; *Smallpiece* v. *Dawes*, 7 C. & P., 40.)

The following cases are illustrations: A married woman married before 1859 without any marriage settlement (see sec. 2 above quoted) owned land about a mile from the farm on which she was living with her husband. The husband who managed this land sowed it with hay, the seed being his own and the crop was afterwards cut at the expense of the wife and taken to the husband's farm, where it was kept separate from his hay. It was held that the hay belonged to the wife and was not seizable under an execution against the husband. (*Plows* v. *Maughan, et al.*, 42 U. C R., 129.)

This case is to be distinguished from others (*Lett* v. *Commercial Bank*, 24 U. C. R., 552; *Harrison* v. *Douglas*, 40 U. C. R., 410 and *Irwin* v. *Maughan*, 26 U. C. C. P., 455) in which the husband and wife were living together on the land, and the husband worked it as his own.

Yet a separate business may be carried on by a wife while residing with her husband. (*Laporte* v. *Costick*, 31 L. T., 434.) and it may be carried on by the wife in a house belonging to her husband. (*Lumley* v. *Timms*, 28 L. T., N. S. 608.)

A woman in 1855 entered the service of a man, as housekeeper in a house which was in his occupation, but not his ordinary place of residence. He shortly afterwards engaged to marry her. In 1861 she commenced the business of preserving fruit which was begun on a small scale, but gradually became a wholesale business. It was carried on in her own name, she had a separate book account, and the husband admitted that it was her own business and was managed solely by her, though he sometimes assisted. In 1874 (subsequent to the Imperial Act, 33 & 34 Vic., cap. 93, the first section of which statute is copied by sec. 7 of our Rev. Stat., cap. 125) he married her. After marriage the business was carried on by her as before in her maiden name: her husband resided in the house, but it did not appear that he took any further part in the business than he had before the marriage. He shortly afterwards died intestate. It was held that the stock in trade and capital of the business belonged to the widow and were not part of the husband's estate. (*Ashworth* v. *Outram*, L. R., 5 Ch. D. 923.)

A butcher having been removed to the workhouse infirmary suffering from *delirium tremens*, a friend lent his wife money to carry on the business for the support of her family. She did so; the husband afterwards returned from the infirmary, but did not interfere in the business. It was held that the business was a separate trading of the wife. *Lovell* v. *Newton*, L. R., 4 C. P. D. 7.)

The principle which seems to be deducible from these cases is, that, where a married woman carries on a busi-

ness as her own, employing her own exertions and earnings in a separate occupation, in which her husband does not take a leading part, and it is not a contrivance to protect him from his creditors, such a business will be her separate business. In addition to the cases above cited, the reader is also referred to the cases cited in the foot note at the beginning of this chapter.

Not only the earnings, etc., of a business, but the stock-in-trade from which the earnings are made, is a part of a married woman's separate estate. (*Ashworth* v. *Outram*, L. R. 5, Ch. D. 923.) The savings as well as the earnings are likewise her separate property. (*Duncan* v. *Cashin*, L. R. 10 C. P. 554. See *Thompson* v. *Bennett*, L. R. 6, Ch. D. 739.)

The occupation or trade must be a lawful one, and the Act would not protect the earnings derived from the keeping of a brothel. (*Mason* v. *Mitchell*, 3, H. & C., 528.) The English Act, 20 & 21, Vic. c. 85, under which this was decided, contains the word "lawful," which word is absent from section 7 of Rev. Stat., c. 125.

Having treated of the separate rights conferred on a wife, and her power of disposition over her choses in action, we will now consider the remedies which the Statute gives to her for the protection of those rights. In this respect, the changes effected by the Statute from common law rules, are of the widest character. We have seen how a married woman could not at common law maintain any action in her own name, separately from her husband. The Statute has altered this rule by the 20th section, the first part of which is as follows :

"A married woman may maintain an action in her own name for the recovery of any wages, earnings, money

and property, by this or any other act, declared to be her separate property, and shall have in her own name, the same remedies, against all persons whomsoever for the protection and security of such wages, earnings, money, and property, and of any chattels or other her separate property for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman."

The latter part of the section treats of her liabilities ; it is, therefore, not within the scope of this chapter, which deals with her rights, or choses in action.

The words in the above section, "by this or any other act declared to be her separate property," seem to give to the wife, remedies co-extensive with her separate estate, both real and personal. In bringing an action in respect of any such separate property, she need not sue by next friend. (*Hooper* v. *Maitland*, 7 P. R. 50); but a next friend must be appointed when the suit is not in respect of her separate property. (*Pruyn* v. *Soby*, 7 P. R. 44.)

A married woman can, under this section, bring an action against a banker for dishonoring a cheque drawn by her, in her separate business. (*Summers* v. *City Bank*, L. R., 9 C. P. 580.) She can also bring an action of trespass against a party who expels her from the place where her separate business is carried on, and for loss of profits, stock in trade, and trade fixtures which she had purchased with her separate earnings. (*Moore* v. *Robinson*, 40 L. T. 99.)

In an action on a foreign judgment, it appeared from the roll that the judgment was on a bill of complaint

brought in the State of New York against one Stevenson and his wife, by one Saxton (the now defendant) to set aside a certain conveyance made to the wife as fraudulent, and that such bill was dismissed with costs to be paid by Saxton. It appeared also that the suit was substantially against the wife, her property being in dispute, and that her husband was joined for conformity only. An assignment of the judgment from Stevenson and wife to the plaintiff was produced, and a previous assignment of all costs accrued or that might accrue. It was admitted on behalf of the now plaintiff, that, at the execution of the assignment, Stevenson was an insolvent under the Insolvent Act of 1869, and that the now plaintiff was the attorney of Stevenson and wife in the foreign court. It was also admitted that Stevenson and wife were married thirty years ago. It was held that the plaintiff was entitled to recover, for, *prima facie* the costs for which the judgment was recovered were incurred and recovered by the wife and did not pass to the assignee of her husband. (*Hughitt* v. *Saxton*, 42 U. C. R. 49.)

To entitle a wife to recover on a note from her husband to her during coverture, it must be shown that there was good consideration proceeding from the wife out of some separate estate belonging to her to support the promise. (*Denham* v. *Brewster, et al.*, 28 U. C. C. P., 607, per *Gwynne*, J., at p. 609.)

A married woman is still entitled, under the Statute of Limitations, to bring an action in respect of her separate property within six years after becoming *discovert*, notwithstanding the powers conferred on her by the 20th section of Rev. Stat. Ont., cap. 125, (*Carroll* v. *Fitzgerald*, 5 Tupper App. R. 322.) The case of *Taylor* v. *Parnell*, (43 U. C. R. 239,) also establishes, with reference to infants, that

under the Statute of Limitations, an infant has, for six years after attaining his majority, the right to bring an action for work and labor, notwithstanding sec. 5 of Rev. Stat. Ont., cap. 135, which gives him the benefit, under certain circumstances, of any contract for work, as if he were of full age.

By the 21st section of the Rev. Stat., cap. 125, a married woman, in her own name, or that of a trustee for her, may insure for her sole benefit, or for the use or benefit of her children, her own life, or with his consent, the life of her husband, for any definite period, or for the term of her or his natural life; and the amount payable under said insurance shall be receivable for the sole and separate use of such married woman or her children, as the case may be, free from the claims of the representatives of her husband, or of any of his creditors.

This power of the wife on her part to insure either her or her husband's life may be compared with cap. 129 of the Revised Statutes, by virtue of which, the husband, on his part, may insure his life for the benefit of his wife or children, and such insurance when effected is free from the husband's control, and from the claims of any of his creditors.

By the 22nd section a married woman may hold stocks, and may vote and enjoy like rights as other stockholders. In reference to this section, Mr. Walkem remarks, "The rights conferred by this section are much more extensive than those of the same class conferred by the English Act. A married woman has, in fact, the same rights as a stockholder as are possessed by men. They enjoy the same rights as other stockholders or members, the word 'other'

no doubt referring particularly to those of the other sex. Hence it may be assumed that a married woman is eligible to any position in the company, which a man may now occupy." (Walkem's M. W. Prop. Acts, p. 49.)

By the 22nd section a married woman may deposit in a bank and check out. The 23rd section protects creditors against dealings in fraud of them. By the 24th section the personal property of a married woman dying intestate is made distributable in the same way as the personal property of a husband dying intestate.

By virtue of the interpretation clause of the Wills Act, it is conceived that the choses in action of a married woman may be bequeathed by her by will.

CHAPTER XI.

PLEADING OF ASSIGNMENTS.

Pleading under the Statute.
Re-assignment to original owner.
Denial of consideration.
Chose in Action itself must be set out.
Plea by debtor that debt is assigned.
Chose in Action assigned to public officer.
Judgment recovered by assignor and revived by assignee.—Suggestion on Roll.
Parties in Equity.
Interpleader.

Pleading under the Statute.

By the ninth section of Rev. Stat. Ont., cap. 116, it is enacted that "the plaintiff in any action or suit, where the assignment is required by this Act to be in writing, may claim as assignee of the original party or first assignor, setting forth briefly the various assignments under which the said *chose in action* has become vested in him; but in all other respects the pleadings and proceedings in such action shall be as if the action was instituted in the name of the original party or first assignor."

A declaration by an assignee of a chose in action alleging that it "was duly assigned in the manner required by the Act," was held to be sufficient: the objection in this case on demurrer was that the above section expressly required particulars of the assignments to be given, and that the declaration did not show whether the assignment was direct

to the plaintiff or whether there were any intermediate assignments. (*Cousins* v. *Bullen*, 6 P. R. 71.)

Re-assignment to Original Owner.

Where the defendant pleaded to a declaration on the common counts that the plaintiffs by writing assigned the debt and causes of action in the declaration mentioned to F. & A., and the plaintiffs replied that, before action, the said F. & A. re-assigned said debt to the plaintiffs, it was held that the replication was good and was not a departure from the declaration. (*O'Connor, et al.* v. *McNamee*, 28 U.C.C. P. 141; see also *Kitson* v. *Hardwicke*, L. R., 7 C. P. 473.) A similar replication was held good with respect to the assignment and re-assignment of a bill of lading. (*Short* v. *Simpson*, L. R., 1 C. P. 248.)

Denial of Consideration.

On a motion to strike out a plea setting up as a defence to an action brought by the assignee of a chose in action, that the assignment was made without valuable consideration, it was contended on behalf of the defendant, that the plea merely raised the issue of beneficial ownership, but it was held to be no plea, such an issue being raised by the plea of non-assignment. (*Bain* v. *McCarthy*, 13 U. C. L. J., N. S. 298.)

Chose in action itself must be set out.

A declaration that D. by writing for valuable consideration duly assigned to plaintiff the sum of $500 "money due and to become due to D. by defendants," was held bad. The words here quoted did not disclose the cause of action; they did not show for what the money was due. (*Smith* v. *Corporation of Ancaster Township*, 45 U. C. R.

86.) The reason for this will be more fully shown in the judgment of Osler, J., who, referring to analogous cases, says at page 89, "*Mitchell* v. *Goodall*, 44 U. C. R., 398, was relied on, in support of the count, but besides the fact that there was no demurrer in that case, the first count stated that the debt assigned was money due to the assignor in the hands of the defendant, which might not unfairly be read, if necessary as an allegation of money had and received by the defendant for the use of the plaintiff. And in that case and in *Brice* v. *Bannister*, L. R., 3 Q. B. D. 569, also cited and relied upon, there was the further allegation that the defendant accepted the order or assignment, which though not necessary to complete the plaintiff's equitable title as assignee of a chose in action, might be read as an averment of an express promise by the debtor to pay the assignee." An averment of the latter kind, as will be seen by reference to pages 58-9 of this work, if proven, would establish privity between the debtor and the assignee, and the debtor would be directly liable on his contract with the assignee. (See also *Coates* v. *Lloyd*, 3 U. C. R. 51.)

Plea by debtor that debt is assigned.

A plea by the debtor that the debt is assigned is a good plea (see ante, pages 61-2); but a defendant so pleading an assignment of the debt to a third party must state the name of such assignee, or allege that his name is not within the knowledge of the defendant. (*Ferguson* v. *Elliott*, 12, U. C. L. J. N. S. 249.)

Chose in action assigned to public officer.

A declaration on the common counts, in an action by the Postmaster General, alleged that the defendants were indebted to one M., who assigned such debt to the plaintiff. It was held sufficient under section 9, above quoted, without

alleging that the debt was connected with plaintiff's office, that being a matter of evidence at the trial. *Postmaster-General* v. *Robertson*, 41 U. C. R. 375.)

Judgment recovered by assignor and revived by assignee—Suggestion on Roll.

In a case wherein the plaintiff had recovered judgment before the passing of 35 Vic., cap. 12, and had subsequently made an assignment of the judgment to a third party, the assignee was allowed to enter a suggestion on the roll reviving the judgment in the assignee's own name. Although, before the passing of the Act, the assignee might not have been entitled to this relief, as having only an equitable interest in the judgment, the assignment would, under the Act, operate as an actual transfer of all rights and interests in the judgment. (*Phillips* v. *Fox*, 8 P. R. 51.)

Parties in Equity.

By the 59th of the Con. Chy. Orders, an assignee of a chose in action may institute a suit in respect thereof without making the assignor a party. (See also Calvert on Parties, 2nd edition, page 325.)

Interpleader.

In the Superior and County Courts of Common Law, application for interpleader as to a debt when it is claimed by different parties from the debtor, should be made after declaration and before plea. (R. S. O., cap. 54, sec. 2.) In garnishee cases the Division Courts possess the power (R. S. O., cap. 47, sec. 136) of adjudicating between different claimants to a fund in the hands of a garnishee. In the

Superior and County Courts, this could not be done under the garnishee clauses of the Common Law Procedure Act, but by virtue of the Administration of Justice Act of 1873, sec. 8 (R. S. Ont., cap. 49, sec. 5), this may now, it is conceived, be done. (See *Victoria Mutual Fire Insurance Company* v. *Bethune*, 1 Tupper App. R. 398.)

ADDENDA.

I.—Notice of Assignment.

(*See pages 50 and 51.*)

Although the assignee of a chose in action takes the same subject to equities, yet he may sometimes be in a better situation than the assignor. Thus, where the assignor is entitled to the chose in action by virtue of a voluntary conveyance, but assigns the same for a valuable consideration, the assignee so taking it has a superior equity to that of creditors who have no specific charge upon the property. (See *George* v. *Millbanke*, 9 Ves. 190; *Houlditch* v. *Wallace*, 5 Cl. & Fin., 629; *Totten* v. *Douglas*, 15 Grant 126.)

A transferee with notice of a prior incumbrance may take the benefit of want of notice in his vendor, (*Lowther* v. *Carlton*, 2 Atk. 241.)

II.—Imperfect Assignment.

A promise to pay money when the debtor receives a debt due to him for a third person does not constitute an equitable assignment so as to charge the debt in the hands of such third person.

A. having a cargo of wheat brought by a vessel called the *Maraquita* in the hands of a factor for sale, obtained from B. a loan of £500 for which he gave B. h's acceptance at

two months, describing the consideration to be "value received in wheat ex *Maraquita*" and they verbally agreed that the bill was to be renewed from time to time until A. should receive from the factor the proceeds of the wheat. It was held that this did not charge the fund in the hands of the factor so as to amount to an equitable assignment of, or an equitable charge upon the fund. (*Field* v. *Megaw*, L. R., 4 C. P., 660.)

III.—Transfer from Husband to Wife.

After the death of a man and his wife, a sum of money was found deposited in a bank at the credit of the wife which had been so deposited in the lifetime of the husband, but it did not appear by whom, although from the surrounding circumstances it was inferred by the Court that the deposit was so made by the husband. The wife survived the husband, and after her death, it was held that it belonged to he estate of the wife. (*Ferris* v. *Hamilton*, 9 Grant, 362. See *Dunmer* v. *Pitcher*, 2 M. & K., 262; *Hayes* v. *Kindersley*, 2 Sm. & G. 197.)

IV.—Covenant to Insure is an Equitable Assignment.

It is said at page 44, "A covenant to insure for the benefit of an incumbrancer operates as an equitable assignment of the policy of insurance." The case of *Greet* v. *Citizens' Insurance Co.*, (27 Grant, 121) is quoted as an authority for this doctrine. This case was carried to appeal, and the decision was reversed on other points. It has not been reported as yet, but the kindness of Mr. Tupper has supplied the following extract from the judgment of the Court of Appeal.

"We think that a right to sue as assignees was created

by the covenant, and that the notices given ought to be deemed sufficient; and although serious questions might arise as to the effect of the settlements made by Brodie, and the extent to which, if at all, they bind the plaintiffs, we assume for the present purpose that they do not prejudice the case."

V.—Chattel Mortgages.

The case of *McMaster & Co. and the Bank of Ottawa* v. *Garland*, reported in the *Canadian Law Times*, vol. 1, page 62, and in the *Canada Law Journal*, vol. 17, page 47, is in point with *Patterson* v. *Kingsley* cited at page 81 of this work.

With reference to registration of a chattel mortgage being notice to the mortgagor, see *Trust and Loan Co.* v. *Shaw* (16 Grant 446) and *Gillelland* v. *Wadsworth* (23 Grant 547; 1 Tupper App. 82); see also 16 U. C. L. J., 338; 17 U. C. L. J. 35, 52 and 72. This question is discussed at pages 78 and 79 of this work.

VI.—Right of Surety to Assignment of Securities.

In Chapter VIII. of this work this subject is treated of.

The following is a report of a recent Common Pleas case in vol. 1 *Canadian Law Times*, 26, and 17 U.C.L.J., 45.

Small v. Riddle *et al.*

Action for Benefit of Joint Endorser—Partnership—Contribution—R.S.O., c. 116, ss. 2, 3, 4.

A promissory note made by the President and Secretary of a syndicate, formed for the purpose of completing the

Hamilton and Dundas Street Railway, in favor of O., S. and the defendants, was by them endorsed to the Canadian Bank of Commerce. On the day the note fell due O. and S. paid the same, S. at the time of so doing directing the bank to endorse it to the plaintiff, who gave no consideration therefor. This was accordingly done and the present action brought against the defendants as endorsers of the note.

Held as a fact, that S. by his payments intended to satisfy the note; and therefore the plaintiff by this endorsement to him took just such rights as S., after such payment, had with respect to the note, and that inasmuch as the defendants were co-partners with S. in the above mentioned railway undertaking, and the note was made for a purpose directly relating to, and not in a matter merely collateral to the partnership, they were not liable to S. in an action against them as endorsers, and so therefore the plaintiff could not recover against them.

In an action by a third person holding for the benefit of a joint endorser against his co-endorsers who are sued as endorsers, such joint endorser cannot claim contribution under R. S. O., c. 116, ss. 2, 3 and 4, for he should sue each of the defendants separately for his share of the contribution, and not the two jointly, and should also declare specially for that proportion of contribution, and should not sue the defendants as endorsers for the full amount of the note.

Held, further, that the Statute above referred to, is not applicable to partnership transactions.

VII.—Judicature Bill—Interpleader.

Sub-section six of section nineteen of the Judicature

Bill, now before the Ontario Legislature, provides as follows:—

(6) In case of an assignment of a debt or other chose in action, if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of law for the relief of trustees.

APPENDIX.

AN ACT RESPECTING WRITS OF EXECUTION.

REVISED STATUTE OF ONTARIO, CAP. 66.

Sec. 28. The Sheriff or other officer having the execution of any writ of *fieri facias* against goods sued out of either of the Superior Courts of Common Law, or out of any County Court, or of any precept made in pursuance thereof, shall seize any money or bank notes (including any surplus of a former execution against the debtor), and any cheques, bills of exchange, promissory notes, bonds, mortgages, specialties, or other securities for money, belonging to the person against whose effects the writ of *fieri facias* has issued, and shall pay or deliver to the party who sued out he execution, any money or bank notes so seized, or a sufficient part thereof, and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, as a security or securities for the amount by the writ and endorsement thereon directed to be levied, or so much thereof as has not been otherwise levied or raised, and such Sheriff or other officer may sue in his own name for the recovery of the sums secured thereby, when the time of payment thereof has arrived. C. S. U. C., c. 22, s. 261.

Sec. 29. The payment to such Sheriff or other officer by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment or of such recovery and levy in execution (as the case may be), from his liability on any such cheque, bill of exchange, promissory note, bond, specialty, or other security. C. S. U. C., c. 22, s. 262.

Sec. 30. The Sheriff or other officer shall pay over to the party who sued out the writ, the money so recovered, or a sufficient sum to discharge the amount by the writ directed to be levied. C. S. U. C., c. 22, s. 263.

Sec. 31. If, after satisfaction of the amount, together with Sheriff's poundage and expenses, any surplus remains in the hands of the Sheriff or

other officer, the same shall be paid to the party against whom the writ issued. C. S. U. C., c. 22, s. 264.

Sec. 32. No Sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty, or other security, unless the party who sued out the execution enters into a bond, with two sufficient sureties, to indemnify such Sheriff or officer from all costs and expenses to be incurred in the prosecution of the action, or to which he may become liable in consequence thereof; and the expense of such bond may be deducted out of any money recovered in such action. C. S. U. C., c. 22, s. 265.

AN ACT RESPECTING ABSCONDING DEBTORS.

REVISED STATUTE OF ONTARIO, CAP. 68.

Sec. 22. In case notice in writing of the writ of attachment has by the Sheriff, or by or on behalf of the plaintiff in such writ, been duly served upon any person owing any debt or demand to, or who has the custody or possession of any property or effects of, an absconding debtor, and in case such person after such notice, pays any such debt or demand or delivers any such property or effects to such absconding debtor, or to any person for the individual use and benefit of such absconding debtor, he shall be deemed to have done so fraudulently, and if the plaintiff recovers judgment against the absconding debtor, and the property and effects seized by the Sheriff are insufficient to satisfy such judgment, such person shall be liable for the amount of such debt or demand, and for such property and effects or the value thereof. C. S. U. C., c. 25, s. 23.

Sec. 23. If, after notice as aforesaid of a writ of attachment, any person indebted to the absconding debtor, or having custody of his property as aforesaid, is sued for such debt, demand or property by the absconding debtor, or by any person to whom the absconding debtor has assigned such debt or property since the date of the writ of attachment, he may, on affidavit, apply to the Court or a Judge, to stay proceedings in the action against himself until it is known whether the property and effects so seized by the Sheriff, are sufficient to discharge the sum or sums recovered against the absconding debtor, and the Court or Judge may make such rule or order in the matter as the Court or Judge thinks fit, and if necessary may direct an issue to try any disputed question of fact. C. S. U. C., c. 25, s. 24.

Sec. 24. If the real and personal property, credits and effects of any

absconding debtor attached by any writ of attachment as aforesaid, prove insufficient to satisfy the executions obtained in the suit thereon against such absconding debtor, the Sheriff having the execution thereof may, by rule or order of the Court or a Judge, to be granted on the application of the plaintiff in any such case, sue for and recover from any person indebted to such absconding debtor, the debt, claim, property, or right of action attachable under this Act, and owing to or recoverable by such absconding debtor, with costs of suit, in which suit the defendant shall be allowed to set up any defence which would have availed him against the absconding debtor at the date of the writ of attachment, and a recovery in such suit by the Sheriff shall operate as a discharge as against such absconding debtor; and such Sheriff shall hold the moneys recovered by him as part of the assets of such absconding debtor, and shall apply them accordingly, C. S. U. C., c. 25, s. 25.

Sec. 25. The declaration in any such action by the Sheriff shall contain an introductory averment to the effect following:

A. B., Sherift of (etc.) who sues under the provisions of *The Act respecting Absconding Debtors*, in order to recover from C. D., debtor to E. F., an absconding debtor, the debt due (*or other claim, according to the facts*) by the said C. D. to the said E. F. complains, etc.

C. S. U. C., c. 25, s. 26.

Sec. 26 *(provides that Sheriff is not bound to sue until creditor gives bond to indemnify him.)*

Sec. 27 *(provides that Sheriff's successor may continue the action.)*

AN ACT RESPECTING INSOLVENCY.

38 Vic. Cap. 16 (Canada).

Repealed by 43 Vic., cap. 1 (Canada), with exception as to pending cases.

Sec. 67. After having acted with due diligence in the collection of the debts, if the assignee finds there remain debts due, the attempt to collect which would be more onerous than beneficial to the estate, he shall report the same to the creditors or inspectors, and with their sanction he may sell the same by public auction, after such advertisement thereof as they may order; and pending such advertisement, the assignee shall keep a list of

the debts be sold, open to inspection at his office, and shall also give free access to all documents and vouchers explanatory of such debts; but all debts amounting to more than one hundred dollars shall be sold separately, except as herein otherwise provided.

Sec. 69. The person who purchases a debt from the assignee, may sue for it in his own name as effectually as the insolvent might have done, and as the assignee is hereby authorized to do; and a bill of sale (Form M.), signed and delivered to him by the assignee, shall be *prima facie* evidence of such purchase, without proof of the handwriting of the assignee, and the debt sold shall, in the Province of Quebec, vest in the purchaser without signification to the debtor; and no warranty, except as to the good faith of the assignee, shall be created by such sale and conveyance, not even that the debt is due.

AN ACT RESPECTING MUTUAL FIRE INSURANCE COMPANIES.

REVISED STATUTE ONTARIO, CAP. 161.

Sec. 41. In case any property, real or personal, is alienated by sale, insolvency or otherwise, the policy shall be void, and shall be surrendered to the directors of the company to be cancelled; and thereupon the assured shall be entitled to receive his deposit note or notes, upon payment of his proportion of all losses and expenses which had accrued prior to such surrender; but the assignee may have the policy transferred to him, and upon application to the directors, such assignee. on giving proper security to their satisfaction for such portion of the deposit, or premium note, or undertaking as remains unpaid, and with their consent within thirty days next after such alienation, may have the policy ratified and confirmed to him, and by such ratification and confirmation said assignee shall be entitled to all the rights and privileges, and be subject to all the liabilities and conditions to which the original party insured was entitled and subject.

Sub-sec. 2. In cases, however, where the assignee is a mortgagee, the directors may permit the policy to remain in force, and to be transferred o him by way of additional security, without requiring any premium note or undertaking from such assignee, or his becoming in any manner personally liable for premiums or otherwise; but in such cases the premium note or undertaking and liability of the mortgagor in respect thereof shall continue in nowise affected. 36 V., c. 44, s. 39.

AN ACT TO AMEND THE MERCANTILE LAW.

REVISED STATUTE OF ONTARIO, CAP. 116.

HER MAJESTY, by and with the advice and consent of the Legis tive Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as "*The Mercantile Amendment Act.*"

2. Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, pays such debt or performs such duty, shall be entitled to have assigned to him or a trustee for him, every judgment, specialty or other security which is held by the creditor in respect of such debt or duty, whether such judgment, specialty or other security be or be not deemed at law to have been satisfied by the payment of the debt or the performance of the duty. 26 V., c. 45, s. 2.

3. Such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be and on proper indemnity, to use the name of the creditor in any action or other proceeding at Law or in Equity, in order to obtain from the principal debtor or any co-surety, co-contractor or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who has so paid such debt or performed such duty; and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him. 26 V., c. 45, s. 3.

4. No co-surety, co-contractor or co-debtor shall be entitled to recover from any other co-surety, co-contractor or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last mentioned person is justly liable. 26 V., c. 45, s. 4.

BILLS OF LADING.

5. Whereas by the custom of merchants, a bill of lading of goods being transferable by endorsement, the property in the goods may thereby pass to the endorsee, but nevertheless, all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property; and whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bona fide* holder for value

should not be questioned by the master or other person signing the same, on the ground of the goods not having been laden as aforesaid:

Therefore it is enacted as follows:

1. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made to himself. 33 V., c. 19, s. 1.

2. Nothing in this section contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee, by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement. 33 V., c. 19, s 2.

3. Every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel or train, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading has actual notice at the time of receiving the same that the goods had not in fact been laden on board, or unless such bill of lading has a stipulation to the contrary; but the master or other person so signing, may exonerate himself in respect to such mis-representation, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or of some person, under whom the holder claims. 33 V., c. 19, s. 3.

CHOSES IN ACTION ASSIGNABLE.

6. In the five next succeeding sections of this Act,

"Assignee" shall include any person now being or hereafter becoming entitled by any first or subsequent assignment, or any derivative or other title, to a *chose in action* and possessing at the time of action brought, the beneficial interest therein, and the right to receive and give an effectual discharge for the moneys or the charge, lien, incumbrance, or other obligation thereby secured. 35 V., c. 12, s. 3.

7. Every debt and *chose in action* arising out of contract shall be assignable at law by any form of writing, but subject to such conditions or

restrictions with respect to the right of transfer as are contained in the original contract; and the assignee thereof shall sue thereon in his own name in such action, and for such relief as the original holder or assignor of such *chose in action* would be entitled to sue for in any Court of Law in this Province. 35 V., c. 12, s. 1.

8. The bonds or debentures of corporations made payable to bearer, or to any person named therein or bearer, may be transferred by delivery, and if payable to any person or order shall (after general endorsation thereof by such person) be transferable by delivery from the time of such endorsation.

2. Any such transfer shall vest the property of such bonds or debentures in the holder thereof to enable to him to maintain an action thereon in his own name. 35 V., c. 12, s. 2; C. S. C., c. 84, s. 14.

9. The plaintiff in any action or suit where the assignment is required by this Act to be in writing may claim as assignee of the original party or first assignor, setting forth briefly the various assignments under which the said *chose in action* has become vested in him; but in all other respects the pleadings and proceedings in such action shall be as if the action was instituted in the name of the original party or first assignor. 35 V., c. 12, s. 4.

10. In case of any assignment of a debt or *chose in action*, arising out of contract, and not assignable by delivery, such transfer shall be subject to any defence, or set off, in respect of the whole or any part of such claim as existed at the time of, or before notice of the assignment to the debtor or other person sought to be made liable, in the same manner and to the same extent as such defence would be effectual, in case there had been no assignment thereof; and such defence or set off shall apply as between the debtor and any assignee of such debt or *chose in action*. 35 V., c. 12, s. 5.

11. In case of any assignment in writing as aforesaid, and notice thereof given to the debtor or other person liable in respect of a *chose in action*, arising out of contract, the assignee shall have, hold, and enjoy the same, free from any claims, defences, or equities, which might arise after such notice as against his assignor. 35 V., c. 12, s. 6.

12. The six next preceding sections of this Act shall not be construed to apply to bills of exchange or promissory notes. 35 V., c. 12, s. 7.

AN ACT RESPECTING CERTAIN SEPARATE RIGHTS OF PROPERTY OF MARRIED WOMEN.

REVISED STATUTE OF ONTARIO, CAP. 125.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as "*The Married Woman's Property Act.*"

2. Every woman who, on or before the fourth day of May, one thousand eight hundred and fifty-nine, married without any marriage contract or settlement, shall and may, from and after the said day, notwithstanding her coverture, have, hold and enjoy all her real estate not on or before the said fourth day of May taken possession of by her husband, by himself or his tenants, and all her personal property not on or before said day reduced into the possession of her husband, whether belonging to her before marriage, or in any way acquired by her after marriage, free from his debts and obligations contracted after the said fourth day of May, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried. C. S. U. C., c. 73, s. 2.

* * * * * * * * *

5. Every woman who has married since the fourth day of May, one thousand eight hundred and fifty-nine, or who married after the passing of this Act, without any marriage contract or settlement, shall and may, notwithstanding her coverture, have, hold and enjoy all her personal property, whether belonging to her before marriage or acquired by her by inheritance, bequest or gift, or as next of kin to an intestate, or in any other way after marriage, free from the debts and obligations of her husband, and free from his control or disposition, without her consent, in as full and ample a manner as if she continued sole and unmarried; but this clause shall not extend to any property received by a married woman from her husband during coverture. C. S. U. C., c. 73, s. 1.

6. Nothing herein contained shall be construed to protect the property of a married woman from seizure and sale on any execution against her husband for her torts; and in such case, execution shall first be levied on her separate property. C. S. U. C., c. 73, s. 3.

7. All the wages and personal earnings of a married woman, and any acquisitions therefrom, and all proceeds or profits from any occupation or trade which she carries on separately from her husband, or derived from any literary, artistic or scientific skill, and all investments of such wages, earnings, moneys or property, shall, after the said second day of March, one thousand eight hundred and seventy-two, be free from the debts or dispositions of her husband, and shall be held and enjoyed by such married woman and disposed of without her husband's consent as fully as if she were a *feme sole ;* and no order for protection shall hereafter be necessary in respect of any of such earnings or acquisitions ; and the possession, whether actual or constructive of the husband, of any personal property of any married woman, shall not render the same liable for his debts. 35 V., c. 16, s. 2.

8. Any married woman having a decree for alimony against her husband, or any married woman who lives apart from her husband, having been obliged to leave him for cruelty or other cause, which by law justifies her leaving him, and renders him liable for her support, or any married woman whose husband is a lunatic, with or without lucid intervals, or any married woman whose husband is undergoing sentence of imprisonment in the Provincial Penitentiary, or in any gaol for a criminal offence, or any married woman, whose husband, from habitual drunkenness, profligacy or other cause, neglects or refuses to provide for her support and that of his family, or any married woman, whose husband has never been in this Province, or any married woman who is deserted or abandoned by her husband, may obtain an order of protection entitling her, notwithstanding her coverture, to have and enjoy all the earnings of her minor children, and any acquisitions therefrom, free from the debts and obligations of her husband and from his control or dispositions, and without his consent, in as full and ample a manner as if she continued sole and unmarried. C. S. U. C , c. 73, s. 6.

9. The married woman may at any time apply, or the husband, or any of the husband's creditors may at any time on notice to the married woman, apply for the discharge of the order of protection ; and if an order for such discharge is made, the same may be registered or filed like the original order. C. S. U. C., c. 73, s. 7.

(Sections 10 to 14 *inclusive relate to proceedings in applications for protection or lers, and to discharge same. Sections* 15 *to* 19 *inclusive relate to* LIABILITY *of husband and wife respectively for wife's debts under certaln circumstances.)*

20. A married woman may maintain an action in her own name for the recovery of any wages, earnings, money and property, by this or any other Act, declared to be her separate property, and shall have in her own name the same remedies, against all persons whomsoever for the protection and security of such wages, earnings, money and property, and of any chattels or other her separate property for her own use, as if such wages earnings, money, chattels and property belonged to her as an unmarried woman; and any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or torts, as if she were unmarried. 35 V., c. 16, s. 9.

21. A married woman, in her own name, or that of a trustee for her, may insure for her sole benefit, or for the use or benefit of her children, her own life, or, with his consent, the life of her husband, for any definite period, or for the term of her or his natural life; and the amount payable under said insurance shall be receivable for the sole and separate use of such married woman or her children, as the case may be, free from the claims of the representatives of her husband, or of any of his creditors. 35 V., c. 16, s. 3.

22. Any married woman may become a stockholder or member of any bank, insurance company or any other incorporated company or association, as fully and effectually as if she were a *feme sole*, and may vote by proxy or otherwise, and enjoy the like rights as other stockholders or members. 35 V., c. 16, s. 5.

23. A married woman may make deposits of money in her own name in any savings or other bank, and withdraw the same by her own cheque; and any receipt or acquittance of such depositor shall be a sufficient legal discharge to any such bank. 35 V., c. 16, s. 6.

24. Nothing hereinbefore contained in reference to the moneys deposited or investments by any married woman, shall, as against creditors of the husband give validity to any deposit or investment of moneys of the husband made in fraud of such creditors, and any money so deposited or invested may be followed as if this Act had not been passed. 35 V., c. 16, s. 7.

25. The separate personal property of a married woman dying intestate shall be distributed in the same proportions between her husband and her children as the personal property of a husband dying intestate is to be distributed between his wife and children; and if there be no child or chil-

dren living at the death of the wife so dying intestate, then such property shall pass or be distributed as if this Act had not been passed. C. S. U. C., c, 73, s. 17.

26. Nothing in this Act contained shall be constrned to prevent any ante-nuptial settlement or contract being made in the same manner and with the same effect as such contract or settlement might be made if this Act had not been passed; but, notwithstanding any such contract or settlement, any separate, real or personal property of a married woman, acquired either before or after marriage, and not coming under or being affected by such contract or settlement, shall be subject to the provisions of this Act, in the same manner as if no such contract or settlement had been made; and as to such property, and her personal earnings and any acquisitions therefrom, such woman shall be considered as having married without any marriage contract or settlement. C. S. U. C., c. 73, s. 19.

APPENDIX OF FORMS.

I.—Assignment of Debt with Warranty.

Know all men by these presents that I, C. P., of the City of in the County of and Province of Ontario, in consideration of dollars now paid to me by N. B., of the said city, broker and general agent, do hereby assign and transfer to him the said N. B. all that certain debt due to me by one T. S., for goods sold by me to said T. S., and all my right, title and interest in and to the same and every part thereof.

And I hereby warrant to him the said N. B., that there is due to me from the said T. S., the sum of seventy dollars on account of the said debt, and that this last mentioned sum is now due to me over and above all claims of set-off or otherwise, and is a valid and subsisting claim for the said amount, and that I have not made or knowingly suffered any act, deed or thing, whereby the said debt or demand, or any part thereof, can be impeached or affected in anywise howsoever.

Dated at this day of A.D. 188

C. P.

II.—General Assignment of Book Debts.

Know all men by these present that I, S. F., of the Town of in the County of in consideration of dollars now paid to me by T. W., of the of in said County of gentleman, do hereby assign and transfer to him the said T. W., all the debts, claims and demands (*mentioned in the Schedule hereto annexed, or contained in a certain Ledger marked A, and signed by me*), whether the said demands are payable in money or otherwise, and all my right, title and interest in and to the said debts, claims and demands, and every or any part thereof respectively.

And I the said S. F., do hereby warrant that there is due to me from the said parties respectively the amounts which respectively appear to be due by said Schedule (or *Ledger*), and that the said sums are respectively due to me over and above all claims of set-off or otherwise, and that they are valid and subsisting claims for the said respective amounts, and I have not made or knowingly suffered any act, deed or thing, whereby the said debts, claims or demands, or any of them, or any part thereof respectively, can be impeached or affected in anywise howsoever.

Dated at this day of
A.D. 188

S. F.

III.—Assignment of Part of Debt.

Know all men by these present that I, P. S., of the of in the County of and Province of Ontario, gentleman, in consideration of the sum of dollars now paid to me by T. M., of the said do hereby assign and transfer to him the said T. M., a part of a certain debt owing to me by one E. L., of the of of the County of ; the said part being to the extent of dollars of said debt, and all my right, title and interest in and to the said part of debt.

And I hereby warrant to the said T. M., that there is due to me from the said E. L., the sum of dollars on account of the said debt over and above all claims for set-off or otherwise, and the said claim is a valid and subsisting claim to the extent of dollars, and I have not knowingly suffered any act, deed or thing, whereby the said claim to the said extent can be impeached or affected in anywise howsoever.

Dated at this day of
A.D. 188

P. S.

IV.—Assignment of Debt as Collateral Security.

Follow form I. *and then insert the following before "Dated," etc.*

Provided always, that if I the said C. P., my executors or administrators shall pay or cause to be paid to the said N. B., his executors, admin-

istrators, or assigns, the said sum of dollars, with interest at per cent. per annum within months from the date thereof, then this assignment, and every matter and thing herein contained shall be void to all intents and purposes whatsoever.

V.—Assignment Clause in Deed of Dissolution by one Partner to the other of Debts owing to Firm.

And the said J. B., doth hereby assign and release to the said J. S. his executors, administrators and assigns all his right, title and interest in and to the debts and other choses in action of the said firm of B. & S., mentioned in the books of the said firm, (*or by Schedule annexed*), without any account to be made or given for or concerning the same, and the said J. B. for himself, his executors and administrators, doth hereby covenant with the said J. S., his executors, administrators and assigns, that he hath not at any time received, released, or discharged the debts hereinbefore assigned and released, nor any part thereof.

VI.—Assignmment of Bond by Endorsement.

Know all men by these present that I, A. B., etc., in consideration of the sum of of lawful money of Canada to me in hand, paid by C. D., of etc., at or before the sealing or delivery of these presents, (the receipt whereof is hereby acknowledged), have sold, assigned, transferred, and set over, and by these present doth sell, assign, transfer, and set over unto the said C. D., his executors, administrators and assigns, the within bond or obligation, and all principal and interest thereby secured, and now due, or hereafter to accrue due thereon, and all benefit and advantage whatever to be had, made or obtained by virtue thereof, and all the right, title, interest, claim, property, and demand whatsoever of me the said A. B. of, in to or out of the said. bond and moneys, together with the said bond. To have, hold, receive and enjoy the said bond and moneys unto the said C. D , his executors, administrators and assigns from henceforth, for his and their own use and benefit for ever.

In witness, etc.

VII.—Assignment of Legacy.

Whereas, one E. B., late of the of in the County of and Province of Ontario, now deceased, made his last will and testament in writing, dated, etc., and thereby did bequeath to W. B., of the said of the sum of dollars to be paid out of the personal estate of the said E. B.; and whereas, the said W. B. has agreed with R. C. of aforesaid, for the assignment to him for the consideration hereinafter mentioned of the said legacy.

Now know all men by these presents, that in pursuance of the said agreement and in consideration of he the said W. B. doth hereby assign and transfer to the said R. C. the said sum of one thousand dollars so bequeathed to him as aforesaid, and all his right, title and interest in and to the same, and the said W. B. doth hereby for himself, his executors and administrators, covenant that the said legacy is a valid and subsisting claim against the estate of the said E. B., and that the said W. B. hath not knowingly suffered any act, deed or thing, whereby the said legacy, or any part thereof, can be impeached or affected in anywise howsoever, or whereby he the said W. B. has become disentitled thereto.

In witness, etc.

W. B.

VIII.—Assignment of Mortgage.

This Indenture, made the day of in the year of our Lord, one thousand eight hundred and

Between J. T. of the of in the County of and Province of Ontario, of the first part, and H. R. of of the second part,

Whereas, by an Indenture dated the day of in the year of our Lord one thousand eight hundred and made between one W. T. of the Township of in the County, of the first part, the party hereto of the first part of the second part, and E. T., the wife of the said W. T. of the third part, in consideration of the sum of one thousand dollars by the said party thereto of the

second part paid to the said party thereto of the first part, the said party thereto of the first part did grant and mortgage unto the said party thereto of the second part his heirs and assigns all and singular, (*describe property*), subject to a proviso in the Indenture now in recital contained for redemption of the said premises on payment to the said party thereto of the second part, his executors, administrators, or assigns, of the sum of dollars with interest for the same at the rate of eight per cent. per annum at the times respectively therein mentioned.

AND WHEREAS, the sum of dollars is now owing to the said party hereto of the first part on the said security,

AND WHEREAS, the said party hereto of the second part has agreed to pay the said party hereto of the first part the sum of dollars upon having assigned to him the said mortgage debt and the security for the same.

NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of one thousand dollars, this day paid to the said party hereto of the first part by the said party hereto of the second part, (the receipt whereof the said party of the first part doth hereby acknowledge), he the said party hereto of the first part doth hereby assign unto the said party of the second part, his executors, administrators and assigns, all that the said sum of dollars now owing to the said party hereto of the first part on the security aforesaid, and all interest now due and henceforth to accrue due for the same and the full benefit of all powers, provisos and covenants contained in the said hereinbefore in part recited Indenture, and all the estate and interest of the said party hereto of the first part in the premises and every part thereof, to hold the said premises unto the said party hereto of the second part, his executors, administrators and assigns absolutely.

AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreement and for the consideration aforesaid, the said party hereto of the first part doth hereby grant unto the said party hereto of the second part, his heirs and assigns, all and singular, the said lands and premises hereinbefore described and mentioned in the said Indenture hereinbefore in part recited, and all the estate and interest of the said party hereto of the said party of the first part in the said lands and premises, TO HOLD the said lands and premises to the use of the said party hereto of the second part, his heirs and assigns, subject to the Equity of Redemption subsisting therein under the said in part recited Indenture.

AND the said party hereto of the first part doth hereby for himself, his

heirs, executors and administrators, covenant with the said party hereto of the second part, his heirs, executors, administrators and assigns, respectively, that the said sum of dollars is now owing to the said party hereto of the first part on the said security, and that he the said party hereto of the first part hath not made or done, or knowingly suffered any act, deed or thing, whereby the said moneys, lands, and premises, or any part thereof, respectively, can be impeached, encumbered, or affected, in anywise howsoever.

IN WITNESS WHEREOF, etc.

IX.—ASSIGNMENT OF CHATTEL MORTGAGE.

THIS INDENTURE, made the day of in the year of our Lord one thousand eight hundred and

BETWEEN W. F., of the of in the County of and Province of Ontario, of the first part, and L. M., of the said of the second part.

WHEREAS, by a chattel mortgage, dated the day of one thousand eight hundred and and filed in the office of the Clerk of the County Court of the County of aforesaid, on the same day, and expressed to be made between one C. D., of the of aforesaid, of the one part, and the party hereto of the first part of the other part, the said C. D., in consideration of the sum of by the said W. F., paid to the said C. D., the said C. D. did grant and mortgage the goods and chattels therein mentioned unto the said W. F., the party hereto of the first part, his executors, administrators and assigns for securing the payment of dollars, and interest at per cent., as therein mentioned, subject to a proviso for redemption of the said goods and chattels, according to the terms therein contained.

AND WHEREAS the sum of is now owing to the said party hereto of the first part on the said security, AND WHEREAS the said party hereto of the second part has agreed to pay the said party hereto of the first part the sum of upon having assigned to him the said mortgage debt, and the security for the same.

NOW THIS INDENTURE WITNESSETH, in pursuance of the said agreement and in consideration of dollars of lawful money of Canada,

now paid by the said party hereto of the second part to the said party hereto of the first part, (the receipt whereof is hereby acknowledged), the said party hereto of the first part doth hereby assign unto the said party of the second part, his executors, administrators and assigns, all that the said sum of now owing to the said party hereto of the first part on the security aforesaid, and all interest now due, and henceforth to accrue due for the same, and the full benefit of all covenants, provisoes, and conditions contained in the said mortgage, and of all other securities for the same, and the said party hereto of the first part doth hereby assign, transfer, and set over unto the said party hereto of the second part, his executors, administrators and assigns, the goods and chattels mentioned and described in the said mortgage, that is to say, (*copy description given in chattel mortgage*), and all the right, title, interest, property, claim and demand whatsoever of him the said party hereto of the first part of in and to the same, or any part thereof. TO HAVE AND TO HOLD the said mortgage and moneys, goods and chattels, and every part thereof to the said party hereto of the second part, his executors, administrators and assigns, absolutely, but subject to the proviso for redemption contained in said mortgage.

AND the said party hereto of the first part doth hereby for himself, his executors, and administrators, covenant with the said party hereto of the second part, his executors, administrators and assigns, respectively, that the sum of dollars is now owing to him the said party hereto of the first part on the said security, and that he the said party hereto of the first part has not made or done, or knowingly suffered any act, deed, or thing whereby the said moneys, goods, and chattels, or any part thereof, respectively, can be impeached, encumbered, or affected in anywise howsoever, or whereby the said goods and chattels, or any of them, have been, or may be, removed from the said County of Middlesex, and that he, his executors, and administrators, will do, perform, and execute every act necessary for further assuring the said mortgage, and moneys, goods, and chattels.

IN WITNESS, etc.

W. F.

X.—ASSIGNMENT OF REPLEVIN BOND.

KNOW ALL MEN by these presents that I, Esquire, Sheriff of the County of have, at the request of the within named C. D., the avowant (*or person making cognizance*) in this cause, assigned over this

Replevin Bond unto the said C.D., pursuant to the Statute in such case made and provided.

In WITNESS whereof I have hereunto set my hand and seal of office this day of A.D., 188 .

Signed, sealed and delivered in the presence of }

XI.—ASSIGNMENT OF BAIL BOND.

I, the within named Sheriff of , have, at the request of A. B., the plaintiff, also within named, assigned to him, the said A. B., the within written bail bond, and all benefit and advantage arising therefrom, pursuant to the Statute in that case made and provided.

In WITNESS whereof I have hereunto set my hand and seal of office this day of A.D., 188 .

Signed, sealed and delivered by the within named Sheriff in the presence of }

XII.—ASSIGNMENT OF POLICY OF INSURANCE.

KNOW ALL MEN by these presents that I, the within named A. B., in consideration of dollars to me paid by C. D., (the receipt whereof is hereby acknowledged) do hereby assign and transfer to him, the said C. D., all my right, property, interest, claim and demand, in and to the within policy of insurance, and all benefit and advantage to be derived therefrom.

WITNESS my hand and seal this day of A.D., 188 .

A. B.

[L.S.]

XIII.—ASSIGMENT OF CLAIM FOR LOSS UNDER FIRE INSURANCE POLICY.

KNOW ALL MEN by these presents that I, the within named A. B., for and in consideration of the sum of dollars to me paid by

C. D., (the receipt whereof is hereby acknowledged) do hereby assign and transfer to the said C. D., all my claims and demands under the within policy of insurance which have already arisen, reserving, however, to myself all my right property and interest, claim and demand in and to the said policy in other respects than the said accrued claims and demands.

IN WITNESS, etc.

XIV.—INSOLVENCY—BILL OF SALE OF DEBT BY ASSIGNEE.

INSOLVENT ACT OF 1875.

In the matter of A. B. *Insolvent.*

In consideration of the sum of $, whereof quit : C. D., assignee of the Insolvent in that capacity, hereby sells and assigns to E. F., accepting thereof all claim by the Insolvent against G. H., of (*describing the debtor*) with the evidences of debt and securities thereto appertaining, but without any warranty of any kind or nature whatsoever.

C. D. Assignee.
E. F.

XV.—ASSIGMENT OF JUDGMENT.

THIS INDENTURE, made the day of A.D., 188 .

BETWEEN A. B., of the of in the and , , of the first part, and C. D., of the of , in the County of , and said Province, of the second part.

WHEREAS the said party, of the first part, on or about the day of , recovered a judgment in the County Court of the County of against C. D., of the said of , , for the sum of dollars damages, and dollars costs, making together the sum of dollars.

AND WHEREAS the said party of the first part has agreed to assign the said judgment and all benefit to arise therefrom, either at law or in equity, unto the said party of the second part, in manner hereinafter expressed:

NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement, and in consideration of the sum of
to the said party of the first part in hand well and truly paid by the said party of the second part (the receipt whereof is hereby acknowledged), he, the said party of the first part, hath granted, bargained, sold, assigned, transferred and set over and by these presents, doth grant, bargain, sell, assign, transfer and set over unto the said party of the second part, his executors, administrators and assigns, All that the said hereinbefore mentioned judgment, and all and every sum and sums of money now due, and hereafter to grow due by virtue thereof for principal, interest and costs, and all benefit to be derived therefrom, either at law or in equity, or otherwise howsoever,

To have, hold, receive, take and enjoy the same, and all benefit and advantage thereof, unto the said party of the second part, his executors, administrators and assigns, to and for his and their own proper use, and as and for his and their own proper moneys and effects absolutely:

And the said party of the first part, for himself, his heirs, executors, administrators and assigns covenants with the said party of the second part, his executors, administrators and assigns that the said judgment is a valid and subsisting judgment of the said Court, and that the said sum of is due and owing to him, the said party of the first part, by the said thereon.

AND that he the said party hereto of the first part hath not made or done, or knowingly suffered any act, deed or thing whereby the said moneys due on the said judgment, or any part thereof can be impeached or affected in anywise howsoever.

IN WITNESS WHEREOF, etc.

XVI.—Assignment of an entire interest (or an undivided one-half interest) in an invention before the issue of patent.*

In consideration of the sum of dollars, to me paid by S. L., of the of , I do hereby sell and assign to the said S. L. all (or an undivided half of all) my right, title, and interest in and to my invention for , as fully set forth and described in the specifications which I have signed preparatory to obtaining a patent. And I do hereby authorize and request the Commissioner of Patents to issue the said patent to the said S. L. (or jointly to myself and the said S. L.) in accordance with this assignment.

Witness my hand and seal this day of A.D., 188 at the

[L. S.] T. L.

XVII.—Assignment of an entire interest in a patent.*

In consideration of dollars, to me paid by N. W., of

I do hereby sell and assign to the said N. W. all my right, title and interest in and to the Patent of , No. , for an improvement in granted to me, A.D., 188 ., the same to be held and enjoyed by the said N. W. to the full end of the term for which such patent is granted, as fully and entirely as the same could

* The following is Rule No. 18 of the Patent Office, in the Department of Agriculture, Ottawa:—"Assignments of patents are to be accompanied by a copy thereof; such copy will be kept in the Patent Office; and the original will be returned to the person sending it, with certificate of registration thereon. The copy is to be neatly written on foolscap paper (8 by 13 inches), with an inner margin of one inch and one half wide."

have been held and enjoyed by me if this assignment and sale had not been made.

Witness my hand and seal this day of A.D., 188 , at

[L. S.] H. K.

XVIII.—Assignment of Copyright in a Book.

This Indenture made the day of in the year etc., between L. J. of the of in the County of gentleman of the one part, and M. W. of the of of the other part.

Whereas the said L. J. has written a book called

Now this Indenture Witnesseth that the said L. J. for and in consideration of the sum of dollars to him paid by the said M. W. (the receipt whereof is hereby acknowledged), hath bargained sold and assigned unto the said M. W. his executors, administrators and assignees all that the said book, and all his copyright title and interest and property in and to the same; to have and hold the said book, copyright and all profit, benefit and advantage that shall or may arise, by and from printing, reprinting and vending the same unto the said M. W. his executors, administrators and assignees for ever. Provided always and nevertheless, and these presents are on this express condition, that the number to be printed of the first and each and every other edition and impression of the said book shall not exceed and that the said M. W. his executors administrators and assigns shall and will pay unto the said L. J. his executors administrators and assigns the further sum and sums of dollar for and upon the reprinting or making a second and each and every other future and further edition or impression that shall or may be made of the said book, for and towards a further reward and satisfaction to the said L. J. for his writing and compiling the same, the said payments to be made before the publication of the said several impressions or editions (after the first) and before any sale of the same, or any part thereof by the said M. W. his executors, administrators and assigns or any of them or by any other person or persons, by, for, or under them, or any of them.

AND the said M. W. for himself, his executors, administrators and assigns doth covenant promise and agree to and with the said L. J. his executors, administrators and assigns, that he the said M. W. his executors, administrators and assigns shall and will pay or cause to be paid to the said L. J. his executors or administrators, the said respective sums of dollar at and upon the reprinting and before the publication and sale of the said second, and every other future and further edition and impression, that shall or may be made of the said book, according to the proviso aforesaid, and the true intent and meaning of these presents.

IN WITNESS etc.

XIX.—NOTICE FROM ASSIGNEE TO DEBTOR.

To A. B.

TAKE NOTICE that C. D. has transferred to me all his right, title and interest in and to a certain claim or demand which he has against you for

and that all sums of money due or accruing due thereunder, are to be paid to me, and you are to deal with me in reference to the said claim or demand.

DATED, etc.

XX.—NOTICE FROM ASSIGNEE OF MORTGAGE TO MORTGAGOR.

To A. B.—

TAKE NOTICE that C. D., of, etc., has assigned to me that certain mortgage made by you to him, securing the sum of with interest at per cent. per annum, payable at the times and in the manner therein mentioned, which said mortgage was registered (*or filed, as in the case of a chattel mortgage, stating when and where registered or filed.*) And all sums of money now due or to accrue due on said mortgage are hereafter to be paid to me, and you are to deal with me in reference to the said mortgage.

DATED, etc.

XXI.—Notice of Assignment of Judgment.

To A. B.—

Take notice that C. D., of, etc., has assigned to me a certain judgment recovered by him against you in the Court of Queen's Bench on of A.D., 188 , for the sum of debt and costs, and all sums of money due under and by virtue of the said judgment are to be paid to me, and you are to deal with me in reference to the same.

Dated, etc.

XXII.—Notice to Sheriff by Assignee of Judgment.

To the Sheriff of the County of

Take Notice that A. B. has transferred to me a certain judgment recovered by the said A. B. against C. D., recovered in the Court of on the day of A.D., 188 , for the sum of debt, and costs, upon which judgment writs of *fieri facias* against the goods and lands of the said judgment debtor have been issued and placed in your hands. You will, therefore, execute the said writs for my benefit, and any proceeds realized or to be realized thereunder are to be paid to me.

Dated, etc.

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ERRATA.

PAGE 56—10th line from bottom, for "*Martin* v, *Miller*," read "*Master* v. *Miller*."

" 59—12th line, for "*Griffin* v. *Weatherby*, L. R. 3, C. & B. 758," read "*Griffin* v. *Weatherby*, L. R. 3, Q. B. 758."

" 92—4th line from bottom, for "cap. III," read "cap. 111."

" 109—10th line from bottom, for "*Crown* v. *Gossage*," read "*Brown* v. *Gossage*."